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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FULTON COUNTY SPECIAL	)	
PURPOSE GRAND JURY,	)	
	)	
PLAINTIFF,	)	
VS.	)	
	)	DOCKET NUMBER
LINDSEY GRAHAM,	)	1:22-CV-3027-LMM
	)	
DEFENDANT.	)	ATLANTA, GEORGIA
	)	AUGUST 10, 2022
	)	
	)	

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE LEIGH MARTIN MAY  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	DONALD WAKEFORD, NATHAN WADE & WILL WOOTEN FULTON COUNTY DISTRICT ATTORNEY'S OFFICE ATLANTA, GEORGIA 30303
FOR THE DEFENDANT:	BRIAN LEA & DONALD MCGAHN JONES DAY ATLANTA, GEORGIA 30361 WASHINGTON, DC 20001

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

*MECHANICAL STENOGRAPHY OF PROCEEDINGS  
AND COMPUTER-AIDED TRANSCRIPT PRODUCED BY*

OFFICIAL COURT REPORTER: MONTRELL VANN, RPR, RMR, RDR, CRR  
2160 UNITED STATES COURTHOUSE  
75 TED TURNER DRIVE, SOUTHWEST  
ATLANTA, GEORGIA 30303  
(404)215-1549

APPEARANCES CONTINUED

FOR THE DEFENDANT:

BART DANIEL  
NELSON, MULLINS, ET AL.  
CHARLESTON, SOUTH CAROLINA 29401

1           (IN ATLANTA, FULTON COUNTY, GEORGIA, AUGUST 10, 2022, IN  
2 OPEN COURT.)

3           THE COURT: OKAY. GOOD AFTERNOON. YOU MAY BE  
4 SEATED. OKAY. WE ARE HERE IN CIVIL ACTION 22-CV-3027, IN RE:  
5 SUBPOENA TO NON-PARTY LINDSEY O. GRAHAM IN HIS OFFICIAL  
6 CAPACITY AS UNITED STATES SENATOR IN THE MATTER OF SPECIAL  
7 PURPOSE GRAND JURY FULTON COUNTY SUPERIOR COURT, CASE NUMBER  
8 2022EX24.

9           AND STARTING WITH COUNSEL FOR SENATOR GRAHAM, IF YOU COULD  
10 INTRODUCE YOURSELVES FOR THE RECORD.

11           MR. LEA: YOUR HONOR, BRIAN LEA FOR SENATOR LINDSEY  
12 GRAHAM WITH JONES DAY. THIS IS MY COLLEAGUE.

13           MR. MCGAHN: DON MCGAHN, JONES DAY ON BEHALF OF  
14 SENATOR GRAHAM.

15           MR. DANIEL: BART DANIEL WITH NELSON, MULLINS ON  
16 BEHALF OF SENATOR GRAHAM.

17           THE COURT: OKAY. GOOD AFTERNOON TO ALL OF YOU.

18           MR. WAKEFORD: GOOD AFTERNOON, YOUR HONOR. DONALD  
19 WAKEFORD WITH THE FULTON COUNTY DISTRICT ATTORNEY'S OFFICE IN  
20 ITS CAPACITY AS A SPECIAL ADVISOR TO THE SPECIAL PURPOSE GRAND  
21 JURY.

22           THE COURT: OKAY.

23           MR. WADE: JUDGE, NATHAN WADE, SPECIAL PROSECUTOR,  
24 FULTON COUNTY DISTRICT ATTORNEY'S OFFICE.

25           MR. WOOTEN: GOOD AFTERNOON, JUDGE. WILL WOOTEN,

1 DEPUTY DISTRICT ATTORNEY, FULTON COUNTY DISTRICT ATTORNEY'S  
2 OFFICE.

3 THE COURT: OKAY. WELL, GOOD AFTERNOON TO ALL OF YOU  
4 AS WELL.

5 MR. WAKEFORD: THANK YOU, JUDGE.

6 THE COURT: WE ARE HERE ON THE SENATOR'S EXPEDITED  
7 MOTION TO QUASH AS IT RELATES TO THE SUBPOENA SENT TO HIM BY  
8 THE FULTON COUNTY SUPERIOR COURT. NOW, BEFORE WE GET DIRECTLY  
9 INTO THE ARGUMENTS, THERE'S JUST A FEW KIND OF PRELIMINARY  
10 ISSUES I WANTED TO GET ON THE RECORD. AND WHAT I WANTED TO DO  
11 IN TALKING ABOUT THESE ISSUES IS JUST TO MAKE SURE THAT WE'RE  
12 ALL ON THE SAME PAGE. IF SOME OF THE ASSUMPTIONS I'M MAKING  
13 NOW ARE INCORRECT, THEN I WANT YOU TO ADDRESS THEM IN YOUR  
14 ARGUMENTS. BUT THERE ARE A FEW THINGS THAT I THINK WE ARE ALL  
15 KIND OF ON THE SAME PAGE AND JUST WANTED TO MAKE SURE THAT I  
16 HAVE THAT CORRECT.

17 THE FIRST IS THAT IT DOES NOT APPEAR THAT ANYBODY IS IN  
18 DISAGREEMENT THAT THIS CASE WAS PROPERLY REMOVED UNDER 28  
19 U.S.C. SECTION 1442(A), WHICH IS THE FEDERAL OFFICER REMOVAL  
20 PROVISION. IT SEEMS LIKE THERE'S NO ISSUE AS IT RELATES TO  
21 THAT. THE OTHER ISSUE I JUST WANTED TO MAKE SURE WE'RE CLEAR  
22 ABOUT IS THAT IT'S MY UNDERSTANDING THAT IN MOVING TO QUASH THE  
23 SUBPOENA, SENATOR GRAHAM HAS THE BURDEN OF PROOF BY A  
24 PREPONDERANCE OF THE EVIDENCE TO SHOW THAT THE SPEECH OR DEBATE  
25 CLAUSE WOULD MOVE TO QUASH THE SUBPOENA. IT'S A LITTLE BIT

1 DIFFERENT WITH THE HIGH-RANKING OFFICIAL DOCTRINE, BUT AT LEAST  
2 AS IT RELATES TO THE SPEECH AND DEBATE CLAUSE THE BURDEN OF  
3 PROOF, IS MY UNDERSTANDING, IS ON THE SENATOR.

4 THE SECOND -- WELL, NOT THE SECOND. THE THIRD ISSUE I  
5 JUST WANTED TO MAKE SURE WE'RE ON THE SAME PAGE WITH IS THAT IF  
6 THE MOTION TO QUASH SUBPOENA IS GRANTED, THEN THAT WOULD CLOSE  
7 THE CASE AND THAT WOULD BE THE END OF THIS PARTICULAR MATTER.  
8 IF I DO NOT QUASH THE SUBPOENA, MY THOUGHT IS TO, AT LEAST IN  
9 TERMS OF THE INSTRUCTIONS, IS TO REMAND IT TO SUPERIOR COURT,  
10 SIMILAR TO WHAT I DID WITH CONGRESSMAN HICE. AND IF THERE ARE  
11 PARTICULAR QUESTIONS TO WHICH THESE ISSUES RELATED TO THESE  
12 IMMUNITIES ARISE, THEN WE'D HAVE TO KIND OF FIGURE OUT, LIKE WE  
13 DID WITH CONGRESSMAN HICE, HOW WE'RE GOING TO DEAL WITH THAT.  
14 BUT THAT'S THE PROCEDURAL WAY WITH WHAT COMES NEXT EITHER WAY,  
15 AND JUST WANTED TO MAKE SURE THAT THERE WASN'T ANY ISSUE ABOUT  
16 THAT.

17 WE DO KNOW A LITTLE BIT MORE IN THIS CASE THAN WE DID IN  
18 THE LAST ONE I HAD. WE STILL HAVE THE SPECIAL GRAND JURY THAT  
19 HAS THE SAME SCOPE, AND I DON'T THINK THERE'S ANY ISSUE WHAT  
20 THE SCOPE OF THIS SPECIAL GRAND JURY IS. WE HAVE THE ORDERS  
21 FROM THE SUPERIOR COURT. I ALSO HAVE IN THE RECORD THE  
22 INFORMATION ABOUT -- I GUESS MORE INFORMATION ABOUT WHAT'S  
23 BEING SOUGHT IN THIS SUBPOENA, AND THAT I'M TAKING FROM THE  
24 EXHIBIT THAT WAS PROVIDED BY SENATOR GRAHAM THAT DOES PROVIDE  
25 SOME INFORMATION IN THE CERTIFICATE OF MATERIAL WITNESS THAT

1 DOES OUTLINE SOME OF THE SUBJECTS THAT IT APPEARS WILL BE  
2 DISCUSSED IN FRONT OF THE GRAND JURY IF SENATOR GRAHAM HAS TO  
3 APPEAR THERE. SO I'M USING THAT INFORMATION AS AT LEAST SOME  
4 KIND OF OUTLINE AS TO THE SUBJECTS THAT MIGHT BE EXPLORED. SO  
5 THOSE ARE SOME INITIAL THOUGHTS THAT I HAVE.

6 THE PARTIES UNDERSTAND THIS, BUT I'LL JUST MAKE SURE IT'S  
7 CLEAR FOR THE RECORD. THERE ARE THREE CASES THAT ARE PROBABLY  
8 THE MOST RELEVANT WE'LL BE TALKING ABOUT AS IT RELATES TO THE  
9 SPEECH OR DEBATE CLAUSE. THEY ARE GRAVEL VS. UNITED STATES AND  
10 UNITED STATES VS. BREWSTER WHICH ARE BOTH SUPREME COURT CASES  
11 FROM JUNE 29TH, 1972. THOSE ARE SOME BIG CASES THAT WE'LL BE  
12 TALKING ABOUT IN SHORTHAND. THERE'S ALSO THE EASTLAND VS.  
13 UNITED STATES SERVICEMEN'S FUND CASE FROM 1975, SO THAT WILL BE  
14 ANOTHER CASE THAT WE'LL BE TALKING IN A LOT OF SHORTHAND ABOUT.  
15 OBVIOUSLY THOSE ARE SOME, JUST A FEW OF THE CASES, BUT WE'LL BE  
16 TALKING ABOUT THOSE A LOT.

17 I HAVE READ ALL THE PARTIES' FILINGS IN THE CASE AND WILL  
18 LIKELY ASK LOTS OF QUESTIONS. THAT'S JUST THE WAY I HANDLE A  
19 HEARING BECAUSE I HAVE TO ULTIMATELY WRITE AN ORDER. SO IF  
20 THERE ARE QUESTIONS, I'M GOING TO ASK THEM. SO I DO CAUTION  
21 EVERYONE NOT TO GET TOO WRAPPED UP IN WHAT THE QUESTIONS ARE.  
22 IT'S JUST ME WORKING THROUGH THE PROCESS. BUT I HAVE READ ALL  
23 THE BRIEFS AND DON'T THINK JUST BECAUSE WE DON'T GET TO  
24 SOMETHING THAT IT'S NOT IMPORTANT. IT MAY BE THAT IT JUST WAS  
25 SOMETHING THAT I HAD LESS OF A QUESTION ON.

1           BUT, WITH THAT, I'LL GO AHEAD AND HEAR FROM COUNSEL FOR  
2 SENATOR GRAHAM AND WE'LL JUST PROCEED.

3           MR. LEA:   THANK YOU, YOUR HONOR.

4           THE COURT:   YOU'RE WELCOME.

5           MR. LEA:   BRIAN LEA ON BEHALF OF SENATOR GRAHAM.   I  
6 WANT TO -- JUST TO MAKE SURE WE DON'T LOSE TRACK, I DO DISAGREE  
7 WITH THE PRESUMPTION ABOUT THE BURDEN AND ABOUT ONE OF THE  
8 PROCEDURAL ISSUES.   AND SO TO GET RIGHT DOWN TO THINGS THAT  
9 YOU'RE -- THE COURT'S AWARE, WE ARE MOVING TO QUASH ENTIRELY,  
10 OR TO THE EXTENT THE COURT THINKS CORRECT, BUT CERTAINLY WE  
11 THINK ENTIRELY BASED ON THREE DOCTRINES, SPEECH OR DEBATE  
12 CLAUSE, SOVEREIGN IMMUNITY, AND THE HIGH-RANKING OFFICIAL  
13 DOCTRINE.   YOU MENTIONED THE HICE PROCEEDINGS.   THIS PROCEEDING  
14 IS NOT THAT FOR THREE REASONS.

15           THE COURT:   WELL, AND I KNOW THAT AND I'M NOT JUST  
16 GOING TO DO WHAT I DID IN THE HICE PROCEEDING BECAUSE THAT WAS  
17 CONSENTED TO IN A LARGE PART.   SO BUT I DO WANT TO MAKE SURE  
18 THAT -- SO I DON'T WANT YOU TO HAVE THE IDEA THAT I'M JUST  
19 GOING TO DO WHAT HAPPENED IN THE HICE BECAUSE THEY AGREED TO  
20 THAT, SO THAT'S A WHOLE DIFFERENT BALL GAME AND I UNDERSTAND  
21 THAT.   BUT I DO WANT TO KNOW WHY YOU DISAGREE WITH THE  
22 PROCEDURAL ISSUES.

23           MR. LEA:   OKAY.   SO TAKING IT IN REVERSE.   ONE,  
24 YOU'VE IDENTIFIED, FACTUAL RECORD IS DIFFERENT.   TO MAKE SURE  
25 THAT IT'S CLEAR, WE SHOULDN'T BE PLAYING WHACK-A-MOLE WITH THE



1 DISTRICT ATTORNEY. THIS IS THE SCOPE OF THE SUBPOENA. AS THE  
2 SUPREME COURT HAS REPEATEDLY DONE, YOU LOOK THROUGH THE  
3 UNDERLYING PAPERS, FIGURE OUT WHAT IS ASKED ABOUT AND THEN RULE  
4 WITHOUT THE IDEA THAT SOMEHOW LURKING A BROADER GRAND JURY  
5 INVESTIGATION MIGHT VAGUELY REVIVE A SUBPOENA BEYOND WHAT THEY  
6 HAVE ACTUALLY ASKED FOR.

7 SECOND, WE DO HAVE A SEPARATE DEFENSE THAT WASN'T  
8 ADDRESSED IN HICE, AND I UNDERSTAND --

9 THE COURT: I THINK MY QUESTION WAS JUST VERY  
10 DIFFERENT. IF, FOR EXAMPLE, I DON'T QUASH THE SUBPOENA -- I'M  
11 NOT SAYING THAT I'M NOT -- IF I DON'T QUASH THE SUBPOENA, WHAT  
12 IS YOUR OBJECTION TO MY THEN SENDING IT BACK TO FULTON COUNTY  
13 SUPERIOR COURT AND THEN POTENTIALLY DEALING WITH A QUESTION BY  
14 QUESTION ANALYSIS OF THAT? WHAT ABOUT THAT PROCESS IS IMPROPER  
15 IF I DON'T QUASH THE SUBPOENA?

16 MR. LEA: IT'S IMPROPER FOR TWO SEPARATE REASONS.  
17 ONE, ARE THESE ARE IMMUNITIES. QUESTION-BY-QUESTION IS A  
18 VIOLATION QUESTION-BY-QUESTION OF THAT IMMUNITY BECAUSE IT'S A  
19 RIGHT NOT TO BE QUESTIONED TO THE EXTENT OF THE SUBPOENA.

20 THE COURT: SO IF I DON'T QUASH THE SUBPOENA, YOU  
21 DON'T INTEND TO MAKE ANY OBJECTIONS ON VARIOUS QUESTIONS BASED  
22 ON IMMUNITIES?

23 MR. LEA: OH, WE WILL ABSOLUTELY DO THAT IF PRESSED  
24 IN THAT POSITION. MY SUGGESTION IS THAT WE SHOULDN'T BE  
25 PRESSED INTO THAT POSITION. WHAT SHOULD HAPPEN IN LIGHT OF THE

1 FACT THAT THIS IS AN IMMUNITY, IS THAT IT SHOULD BE WORKED OUT  
2 BEFOREHAND WHERE THE GOVERNMENT COMES FORWARD, LIKE IN SOME OF  
3 THE CASES WE'VE CITED, WITH BUCKETS OF INDIVIDUAL QUESTIONS OR  
4 TOPICS. AND THEN A RULING CAN BE MADE TO FIGURE OUT HOW FAR  
5 THAT IMMUNITY EXTENDS. OBVIOUSLY WE THINK IT EXTENDS TO  
6 EVERYTHING COVERED, BUT AT A MINIMUM WE SHOULD HAVE A RULING ON  
7 WHAT IS IN AND WHAT IS OUT. SECOND, IT SHOULD HAPPEN IN THIS  
8 COURT. CONGRESS HAS ENACTED THE REMOVAL STATUTE TO GIVE A  
9 FEDERAL FORUM FOR THIS. SO THE BACK AND FORTH, IF SOME IS  
10 NEEDED, TO CLARIFY SHOULD BE WORKED OUT HERE SO THAT YOUR  
11 HONOR, THE FEDERAL FORUM, CAN RULE.

12 THE COURT: AND HOW DO I DO THAT IF I DON'T KNOW WHAT  
13 QUESTIONS ARE GOING TO BE ASKED IN THE GRAND JURY PROCEEDING?

14 MR. LEA: SO THEY WOULD NEED TO COME FORWARD AND SHOW  
15 WHAT THEY WANT TO ASK THAT THEY THINK FALLS OUTSIDE OF THE  
16 IMMUNITY. THEY SHOULD COME AND MAKE THAT CASE. THAT DOES WEED  
17 A LITTLE BIT INTO ANOTHER POINT YOU RAISED WHICH IS THE IDEA  
18 ABOUT BURDENS, BUT THE POINT IS THAT THE RECORD SHOULD BE MADE  
19 HERE SO THAT THE COURT CAN RULE. AND THEN, IF NECESSARY, AN  
20 APPEAL CAN BE TAKEN, OR AT A MINIMUM YOU WOULD HAVE PROVIDED  
21 GUIDANCE FOR THE PROCEEDINGS IN THE STATE COURT. THAT'S WHAT  
22 1442 IS ABOUT, IS GIVING THE FEDERAL FORUM FOR A RULING. AND,  
23 AGAIN, IF WE'RE FORCED TO GO AND DO THIS IN REALTIME WHERE  
24 THERE'S NO ATTORNEY PRESENT IN A GRAND JURY ROOM ON A  
25 QUESTION-BY-QUESTION BASIS, THAT ITSELF IS AN INVASION. TO

1 TAKE JUST THE SPEECH OR DEBATE CLAUSE --

2 THE COURT: WELL, ONCE I RULE ON THE MOTION TO QUASH,  
3 YOUR -- THE ONLY THING PENDING IN THIS CASE IS THE MOTION TO  
4 QUASH. IF I RULE ON THAT AND DON'T QUASH, THERE'S NOT ANYTHING  
5 LEFT IN THE CASE. WHAT WOULD YOU BE -- I MEAN, PROCEDURALLY  
6 WHY WOULD I BE KEEPING A CASE THAT THE ONLY THING IN IT IS THE  
7 MOTION TO QUASH THAT HAS BEEN DEALT WITH? WHY WOULD I NOT  
8 REMAND IT OVER TO SUPERIOR COURT TO HAVE IT GO TO A GRAND JURY  
9 IF I'M NOT QUASHING THE SUBPOENA?

10 MR. LEA: THERE STILL WOULD BE PENDING THE SUBPOENA  
11 ITSELF AND THEN THE FEDERAL DEFENSES TO BE WORKED OUT. THERE  
12 MIGHT BE A FACTUAL DEVELOPMENT, BUT THAT DOESN'T MEAN THE CASE  
13 IS SOMEHOW NO LONGER PENDING. THERE WOULD STILL BE THE LIVE  
14 DISPUTE. AND THE COURT COULD QUASH WITH INSTRUCTION. I MEAN,  
15 THAT WOULD BE THE EASIEST WAY TO DO THAT, BUT CERTAINLY  
16 WHATEVER HAPPENS SHOULD BE WORKED OUT HERE. AND, AGAIN, NOT IN  
17 A GRAND JURY ROOM WITH NO LAWYER PRESENT WHEN THE CLAUSE ITSELF  
18 SAYS, "SHALL NOT BE QUESTIONED." SO IT'S NOT AN IDEA OF THIS  
19 IS A PRIVILEGE LIKE ATTORNEY-CLIENT PRIVILEGE OR LIKE THE  
20 FIFTH. THIS IS AN IMMUNITY FROM THE ACTION ITSELF, AND THAT'S  
21 TRUE OF SOVEREIGN IMMUNITY.

22 THE COURT: HOW COULD I QUASH WITH INSTRUCTIONS ABOUT  
23 WHAT QUESTIONS COULD BE ANSWERED OR NOT WHEN YOU DIDN'T BRIEF  
24 THAT ISSUE?

25 MR. LEA: SORRY.

1 THE COURT: THAT'S OKAY. YOU'RE SAYING THAT ONE OF  
2 THE OPTIONS IS IF I DIDN'T QUASH, THAT I COULD GIVE  
3 INSTRUCTIONS ABOUT WHAT SUBJECT MATTERS ARE COVERED AND WHICH  
4 ONES AREN'T. BUT YOU DIDN'T REQUEST ME TO DO THAT, SO THAT  
5 ISSUE HAS NOT BEEN BRIEFED.

6 MR. LEA: THAT WOULD JUST BE A RULING WITHIN THE  
7 SCOPE OF EXACTLY WHAT WE ASKED FOR. IF THE COURT WANTS  
8 ADDITIONAL BRIEFING, WE WOULD BE HAPPY TO DO IT, BUT THAT WOULD  
9 JUST BE LESSER INCLUDED RELIEF. WE WANT A COMPLETE QUASHAL.  
10 THE COURT'S NOT READY TO DO THAT YET, THINKS THERE NEEDS TO BE  
11 MORE FACTUAL DEVELOPMENT, UNDER 1442 THAT BELONGS BEFORE THIS  
12 COURT WHICH --

13 THE COURT: AND SO YOU WOULDN'T REQUEST ANY  
14 ADDITIONAL BRIEFING, YOU WOULD BE COMFORTABLE WITH ME DOING  
15 THAT ON THIS RECORD?

16 MR. LEA: WE THINK ON THIS RECORD THE COURT SHOULD  
17 QUASH ENTIRELY. IF THE COURT'S CONSIDERING SOME SORT OF LESSER  
18 RELIEF, OF COURSE WE'D BE HAPPY TO OFFER ANY BRIEFING THAT IS  
19 HELPFUL TO YOUR HONOR, BUT WE CERTAINLY THINK THAT THE RECORD  
20 BEFORE IT IS CLEAR THAT AN ABSOLUTE QUASHAL IS WARRANTED.

21 THE COURT: AND I UNDERSTAND THAT, BUT I WANT TO  
22 CONSIDER ALL THE ALTERNATIVES. SO THE OTHER QUESTION YOU SAID  
23 THAT YOU HAD A DISAGREEMENT WITH IS THAT SENATOR GRAHAM DID NOT  
24 HAVE THE BURDEN OF PROOF ON THE SPEECH OR DEBATE CLAUSE  
25 DETERMINING SOMETHING IS LEGISLATIVE. THERE'S AN ELEVENTH

1 CIRCUIT CASE. AND I ACTUALLY DIDN'T GRAB IT BECAUSE I THOUGHT  
2 IT WAS PRETTY CLEAR. BUT WHY IS THE BURDEN OF PROOF NOT ON  
3 SENATOR GRAHAM TO SHOW WHETHER SOMETHING IS LEGISLATIVE OR NOT?

4 MR. LEA: TO TAKE FIRST THE AFFIRMATIVE ARGUMENT,  
5 IT'S NOT BECAUSE IT'S A JURISDICTIONAL ISSUE. AND WE HAVE THE  
6 RANGEL V. BOEHNER CASE SAYS THAT AND IS THE PARTY INVOKING  
7 JURISDICTION. HERE, THE PARTY SEEKING THE SUBPOENA, NOT THIS  
8 COURT'S JURISDICTION, THE LOWER COURT'S JURISDICTION BECAUSE WE  
9 HAVE DERIVATIVE JURISDICTION IN THIS CONTEXT. SO THE PARTY  
10 INVOKING THE JURISDICTION TO QUESTION IS THE DISTRICT ATTORNEY.  
11 THEREFORE, THEY HAVE TO MAKE OUT THE CASE THAT THE IMMUNITY  
12 DOESN'T APPLY. SECONDLY, THAT JUST MAKES SENSE. IT'S AN  
13 IMMUNITY. IF WE HAVE TO COME IN AND ANSWER QUESTIONS TO GET AN  
14 IMMUNITY THAT TELLS US WE DON'T HAVE TO ANSWER QUESTIONS, THAT  
15 HAS MADE THE IMMUNITY IN LARGE PART SELF-DEFEATING.

16 THE COURT: DID YOU RESPOND -- THE ARGUMENT WAS  
17 RAISED BY THE D.A. THAT THE BURDEN OF PROOF WAS ON THE SENATOR.  
18 AND I DIDN'T SEE THAT YOU RESPONDED TO IT IN THE BRIEF. AND  
19 THEN THERE'S THIS BRYANT VS. C.E.O. OF DEKALB COUNTY CASE WHICH  
20 IS A 2009, ELEVENTH CIRCUIT CASE. AND IT STATES THAT OFFICIALS  
21 CLAIMING PROTECTION UNDER THESE IMMUNITIES MUST SHOW THAT SUCH  
22 IMMUNITY IS JUSTIFIED. SO IT APPEARS THAT THIS ELEVENTH  
23 CIRCUIT CASE -- YOU DIDN'T RESPOND TO IT IN YOUR BRIEF, SO I  
24 ASSUME THAT WITH THAT AND THIS ELEVENTH CIRCUIT CITE THERE  
25 WASN'T A QUESTION ABOUT IT. BUT DID YOU WANT TO BRIEF IT IN

1 SOME WAY, OR WHAT CASE DID YOU CITE AGAIN? I DON'T THINK YOU  
2 HAD CITED IT IN YOUR BRIEFS.

3 MR. LEA: WE DID NOT GET A BURDEN-OF-PROOF ARGUMENT  
4 FROM THE GOVERNMENT'S BRIEF. WE DID SEE BRYANT CITED, BUT ALL  
5 BRYANT SAID IS YOU HAVE TO SHOW -- I BELIEVE IS THE WORD. I  
6 MIGHT BE MISQUOTING -- AND CERTAINLY IT IS ON US TO EXPLAIN HOW  
7 WHAT WE'RE DOING IS LEGISLATIVE. IF YOU READ BRYANT, THAT'S  
8 NOT A BURDEN-OF-PROOF CASE. THAT CASE WAS ABOUT COUNTY  
9 OFFICIALS. AND FOR THE REASONS I'VE GIVEN, THE BURDEN SHOULD  
10 BE ON THEM AS A MATTER OF FIRST PRINCIPLES. BRYANT DIDN'T  
11 GRAPPLE --

12 THE COURT: TELL ME THAT CASE AGAIN THAT YOU WERE  
13 CITING FOR THE FACT THAT THE BURDEN OF PROOF IS ON THE D.A.'S  
14 OFFICE.

15 MR. LEA: NO. I SAID IT'S JURISDICTIONAL. SO --

16 THE COURT: WELL, THAT'S -- OKAY.

17 MR. LEA: AND BECAUSE IT'S JURISDICTIONAL, THEY'RE  
18 THE PARTY INVOKING JURISDICTION. THEY HAVE TO PROVE IT.  
19 THAT'S RANGEL V. BOEHNER VS. (VERBATIM) THE DISTRICT OF  
20 COLUMBIA CIRCUIT.

21 THE COURT: OKAY.

22 MR. LEA: AND SO BRYANTS (VERBATIM) DIDN'T GRAPPLE  
23 WITH THE BURDEN-OF-PROOF ISSUE AT ALL. IT JUST SAID IN PASSING  
24 THAT YOU HAVE TO SHOW THAT YOU ARE ENTITLED TO THE IMMUNITY.  
25 AND WE HAVE DONE THAT HERE. THE COURT DOESN'T NEED TO GET INTO

1 BURDEN. AND THE REASON THE COURT DOESN'T IS BECAUSE WE KNOW  
2 ALL THE FACTS HERE. THIS GETS ME INTO THE POINT ABOUT EASTLAND  
3 AND THE OTHER CASES. WE HAVE ONE PHONE CALL, AND THAT PHONE  
4 CALL HAS BEEN DESCRIBED BY EVERYBODY. EVERYBODY ACKNOWLEDGES  
5 THAT IT IS ABOUT ELECTORAL PROCESS AND ABOUT VERIFICATION OF  
6 ABSENTEE BALLOTS, HOW YOU ENSURE SECURITY. AND SO THE ONLY  
7 DISPUTE IS A DISPUTE BROUGHT ON BY SECRETARY OF STATE  
8 RAFFENSPERGER'S STATEMENTS THAT IT WAS, QUOTE, IMPLIED THAT  
9 SOMEHOW THESE (VERBATIM) SHOULD BE THROWING OUT BALLOTS. THAT  
10 IS A STATEMENT ABOUT SENATOR GRAHAM'S MOTIVATION FOR THE COLD  
11 HARD FACTS OF THE CONVERSATION ABOUT ELECTORAL SECURITY. AND  
12 THE SUPREME COURT HAS MADE CLEAR -- TIME IS, AGAIN, SINCE 1880  
13 UP THROUGH EASTLAND AND THROUGH MORE RECENT CASES -- THAT  
14 MOTIVE IS IRRELEVANT. AND SO WHEN YOU STRIP THAT AWAY -- AND  
15 I'M LITERALLY GOING TO QUOTE FROM THE BOGAN SCOTT CASE WHERE  
16 THE SUPREME COURT SAID THE QUESTION IS WHETHER STRIPPED OF ALL  
17 CONSIDERATIONS OF MOTIVE THE ACT CAN FAIRLY MAKE -- CAN FAIRLY  
18 BE DESCRIBED AS LEGISLATIVE. AND SO HERE STRIP AWAY THE  
19 MOTIVE, STRIP AWAY THE IMPLICATION THAT SECRETARY OF STATE  
20 RAFFENSPERGER CLAIMS TO HAVE PICKED UP, ALL YOU HAVE IS A  
21 CONVERSATION ABOUT ELECTORAL PROCESS.

22 THE COURT: WELL, AND LET ME ASK YOU ABOUT THAT  
23 BECAUSE IN YOUR BRIEF WHEN YOU CITE TO THE FACT THAT THE CALL  
24 WAS INFORMATIONAL, THAT WHAT IT WAS THAT SENATOR GRAHAM WAS  
25 SEEKING INFORMATION FROM RAFFENSPERGER, YOU CITED TO I THINK IT

1 WAS AN N.B.C. -- LET ME GRAB IT. LET ME SEE. I'VE GOT SO MANY  
2 PAPERS HERE. AN N.B.C. NEWS STORY FOR THAT. AND THERE WAS A  
3 VIDEO THAT WAS ATTACHED TO IT. AND IT WAS A INTERVIEW THAT  
4 SENATOR GRAHAM WAS MAKING. AND IN THAT INTERVIEW YOU CITE TO  
5 THE PART THAT HE WAS COLLECTING INFORMATION, WHICH I AGREE  
6 WITH, AND THEN LATER IN THAT SAME INTERVIEW SENATOR GRAHAM SAID  
7 THAT HE WAS ALSO SUGGESTING TO GEORGIA ELECTION OFFICIALS TO  
8 CHANGE THE PROCESS TO MAKE SURE A BIPARTISAN TEAM VERIFY  
9 SIGNATURES, AND IF THERE IS A DISPUTE, COME UP WITH AN APPEAL  
10 PROCESS. SO THAT WAS INFORMATION THAT YOU CITED TO. WHY IS  
11 THAT NOT JUST INFORMATION-GATHERING? IT SOUNDS LIKE IT'S MORE  
12 IN TERMS OF MAKING SUGGESTIONS TO THE PROCESS.

13 MR. LEA: TWO ANSWERS TO THAT. ONE, IS IT IS  
14 SUGGESTING LEGISLATIVE FIXES THAT CAN GO FORWARD. AND SO THAT  
15 IS WITHIN THE SCOPE OF THE LEGISLATURE AND ABOUT HOW TO FIX THE  
16 PROBLEM THAT HE PERCEIVED AT THE TIME OF WIDESPREAD PROBLEMS IN  
17 VOTING. AND SO THAT DOESN'T SOMEHOW TAKE THE INVESTIGATION  
18 OUTSIDE OF THE LEGISLATIVE REALM. EVEN AMICI'S LEE CASE FROM  
19 THE THIRD CIRCUIT, WHICH HAS BEEN MORE LAX THAN THE D.C.  
20 CIRCUIT AND SOME OF THE OTHERS, HAS ACKNOWLEDGED YOU DON'T  
21 FLYSPECK AND LOOK FOR A PARTICULAR SENTENCE THAT YOU THINK  
22 TAKES A CONVERSATION THAT IS ABOUT LEGISLATIVE PROCESS OUTSIDE  
23 OF THE PROCESS. AND HERE WE DON'T EVEN HAVE THAT. WE JUST  
24 HAVE A DISCUSSION OF PROPOSED LEGISLATIVE FIXES, WHICH IS  
25 EXACTLY WHAT A LEGISLATIVE INVESTIGATION IS DESIGNED TO DO.



1 THE COURT: WELL, WHEN I READ WHAT THE SUBPOENA IS  
2 ABOUT -- AND I THINK THERE IS TWO DIFFERENT CATEGORIES, AT  
3 LEAST THE WAY I LOOK AT IT, IS THE QUESTIONS THAT SENATOR  
4 GRAHAM IS ASKING TO GET INFORMATION ON -- I THOUGHT IT WAS TWO  
5 CALLS, BUT YOU SAID ONE CALL. I DON'T KNOW HOW MANY CALLS  
6 THERE REALLY ARE --

7 MR. LEA: -- I MIGHT HAVE MISSPOKE. THEY REFERENCE  
8 TWO. THEY DO REFERENCE TWO --

9 THE COURT: OKAY. I THOUGHT THERE WERE TWO. SO THE  
10 QUESTIONS HE'S ASKING TO GET INFORMATION, TO ME, FALL IN ONE  
11 BUCKET, AND YOU HAVE A STRONGER ARGUMENT AS IT RELATES TO THOSE  
12 QUESTIONS. NOW, THERE IS, TO ME, A SEPARATE BUCKET, AND THE  
13 SUBPOENA REFERS TO INFORMATION THAT, TO ME, IS OUTSIDE JUST  
14 THOSE INFORMATIONAL-GATHERING QUESTIONS. AND SO, FOR EXAMPLE,  
15 IT'S ASKING ABOUT WHAT PERHAPS SENATOR GRAHAM WAS ASKING  
16 SOMEONE TO DO, NOT GATHERING INFORMATION, TELLING THEM TO DO  
17 THINGS. SENATOR GRAHAM WAS ALSO HAVING CONVERSATIONS WITH, AT  
18 LEAST WHICH SAID IN THE SUBPOENA, POTENTIALLY WITH THE TRUMP  
19 CAMPAIGN ABOUT VARIOUS ISSUES. AND WHEN I READ THESE CASES, I  
20 SEE THAT THE SPEECH OR DEBATE CLAUSE DOES NOT LIMIT QUESTIONS  
21 INTO POLITICAL AREAS. IT JUST DOES WITH LEGISLATIVE. SO IF I  
22 HAVE TO DETERMINE WHETHER VARIOUS PARTS OF THE QUESTIONS THAT  
23 ARE BEING ASKED FALL WITHIN THIS POLITICAL OR LEGISLATIVE  
24 BUCKET, HOW DO I DO THAT WITHOUT AT LEAST PARSING WHAT THESE  
25 TOPICS ARE ABOUT?

1           MR. LEA: SO TO TAKE THE TWO CATEGORIES YOU'VE RAISED  
2 IN REVERSE ORDER, THE TRUMP REFERENCE IN THE SUBPOENA TO THE  
3 TRUMP CALLS, THAT WILL RISE AND FALL WITH HOW YOU TREAT THE  
4 PHONE CALLS THEMSELVES. FOR TWO REASONS, ONE THEY'RE TIED UP  
5 WHEN THEY -- THEY'RE CLEARLY, IF THAT'S PART OF THE  
6 INVESTIGATION, THEY ARE, TOO, BECAUSE THE SUBPOENA ITSELF AND  
7 THE CERTIFICATE TIE THEM IN AND THEY MADE CLEAR THAT EVERYTHING  
8 IS ABOUT THIS PHONE CALL. SO IF THE PHONE CALL IS PROTECTED,  
9 THAT'S PROTECTED, TOO, JUST AS A MATTER OF FIRST PRINCIPLES.  
10 BUT ALSO BECAUSE THE SUPREME COURT HAS MADE CLEAR IN THE  
11 HELSTOSKI CASE THAT YOU CAN'T WAIVE SPEECH OR DEBATE  
12 PROTECTION, NOT EVEN EXPRESSLY BY AN INDIVIDUAL  
13 CONGRESSMAN'S --

14           THE COURT: WELL, I THINK I'M TALKING ABOUT SOMETHING  
15 DIFFERENT. SO I UNDERSTAND YOUR ARGUMENT THAT I SHOULD THINK  
16 THAT THE ENTIRETY OF THE PHONE CALLS HAVE TO DO WITH THIS  
17 LEGISLATIVE INVESTIGATION AND PROCESS. I UNDERSTAND THAT  
18 ARGUMENT. ASSUME FOR A MOMENT THAT I DON'T ENTIRELY ACCEPT  
19 THAT ARGUMENT, THAT INSTEAD I WANT TO LOOK AT THE VARIOUS PARTS  
20 OF THE TELEPHONE CALL TO SEE IF THEY ARE IN FACT LEGISLATIVE.  
21 SO IF I AM LOOKING AT THE DIFFERENT PARTS OF THE TELEPHONE  
22 CALL, IT APPEARS THAT THERE ARE VERY DIFFERENT SUBJECT MATTERS  
23 THAT WERE CONTAINED WITHIN THIS CALL. ONE, IS THE  
24 INFORMATION-GATHERING, WHICH I THINK IS YOUR STRONGEST AREA,  
25 BUT THE OTHER PARTS THEY'RE ASKED ABOUT, FOR EXAMPLE, WHO SET

1 UP THE CALL AND, LIKE, WHAT SENATOR GRAHAM WAS TELLING PEOPLE  
2 TO DO, WHAT INSTRUCTIONS HE WAS GETTING FROM THE TRUMP  
3 CAMPAIGN, THAT, TO ME, IS A VERY DIFFERENT TYPE OF DISCUSSION  
4 THAN THE INFORMATION-GATHERING. SO, I MEAN, YOU CAN KEEP  
5 ARGUING THAT I JUST CONSIDER THE CALL AS A WHOLE, BUT IF I  
6 DON'T DO THAT, DO YOU WANT TO ADDRESS THESE SUBSETS OF THE  
7 CONVERSATION?

8 MR. LEA: TWO RE -- YES, I DO, SHORT ANSWER, BUT TWO  
9 RESPONSES. JUST THE LAST NOTE ON THAT, THE THIRD DISTRICT, AS  
10 I MENTIONED, HAS BEEN LAX IN TERMS OF APPLYING THE SPEECH OR  
11 DEBATE CLAUSE, BUT EVEN HAS ACKNOWLEDGED THAT IF THE  
12 PREDOMINANT PURPOSE IS LEGISLATIVE, THEN A PARTICULAR  
13 CONVERSATION IS PROTECTED. THAT'S IN THE AMICI BRIEF ON THEIR  
14 SIDE. I JUST SAY THAT TO CLOSE THE LOOP ON THE CONVERSATION AS  
15 A WHOLE. YES, IF THE COURT IS INCLINED TO THINK IT'S NECESSARY  
16 TO PARSE THINGS OUT, IT SHOULD DO THAT. I DON'T SEE ANYTHING  
17 WITHIN THE UNIVERSE OF THE CALL ITSELF THAT WOULD BE  
18 NON-LEGISLATIVE FACT-GATHERING UNLESS YOU GET INTO ISSUES OF  
19 INTENT ABOUT WAS HE REALLY TRYING TO GO TO ACTION OR WAS HE  
20 REALLY FACT-GATHERING. AND FOR THAT REASON YOU HAVE TO STRIP  
21 AWAY THE INTENT. THE CONVERSATIONS OUTSIDE OF IT, WHICH WAS  
22 THE POINT I STARTED WITH AND MAYBE SHOULD HAVE FINISHED WITH,  
23 YOU'VE GOT THE PHONE CALL AND THEN YOU'VE GOT ANCILLARY STUFF  
24 THAT'S KIND OF REFERRED TO IN PASSING IN THEIR BRIEF. THAT  
25 WILL RISE LARGELY WITH THE PHONE CALL. IF THE PHONE CALL OR

1 PARTS OF IT ARE INVESTIGATIVE, THEN THE ASSOCIATED OUTSIDE  
2 ACTIONS WILL BE INVESTIGATIVE, TOO. IF THEY'RE NOT, THEN NOT.  
3 AND THAT'S ACKNOWLEDGED IN AMICI'S CASES WHICH SAY YOU CAN'T  
4 USE EXTERNAL COMMUNICATIONS ABOUT LOGISTICS OR FOLLOW-UP TO  
5 BACKDOOR YOUR WAY THROUGH THE SPEECH-OR-DEBATE PRIVILEGE  
6 BECAUSE IT IS ABSOLUTE WHERE IT APPLIES. AND SO I DON'T SEE AN  
7 EXHORTATION THERE, BUT IF THE COURT IS INCLINED TO THINK THAT  
8 THE PHONE CALL NEEDS TO BE DIVVYED, WE DON'T THINK THAT'S  
9 PROPER, BUT IF YOU DO, EVEN THAT WOULD BE HELPFUL TO THE  
10 PARTIES TO EXPLAIN WHAT PARTS AND CATEGORIES YOU THINK ARE AND  
11 ARE NOT OFF LIMITS.

12 THE COURT: WELL, GOING BACK TO YOUR ARGUMENT THAT IF  
13 SENATOR GRAHAM HAS -- THERE IS NO AFFIDAVIT, BUT IF THERE IS A  
14 STATEMENT IN THE BRIEF THAT THE CALLS WERE MADE TO DO  
15 FACT-FINDING AND THEN THAT PROTECTS THE ENTIRETY OF ANY  
16 POSSIBLE THING THAT WAS SAID ON THE PHONE CALL, THAT IS VERY  
17 WORRISOME TO ME AND IT ALSO I THINK FALLS OUTSIDE OF WHAT THE  
18 SUPREME COURT HAS STATED IN THESE OTHER CASES BECAUSE UNDER  
19 YOUR ARGUMENT SENATOR GRAHAM COULD START A CALL AND FACT-FIND  
20 ABOUT THE ELECTION AND THEN THE CALL COULD START GOING  
21 SIDEWAYS. IT COULD BE TALKING ABOUT HIRING HACKERS OR  
22 ANYTHING, ANY CRIMINAL CONDUCT COULD HAPPEN ON THIS CALL. AND  
23 THEN BECAUSE THE CALL STARTED AS THIS FACT-FINDING MEASURE,  
24 ANYTHING THAT WOULD HAPPEN WOULD BE THEN PROTECTED AGAINST  
25 DISCUSSION IN FRONT OF A GRAND JURY. AND SO I DON'T UNDERSTAND

1 HOW JUST BY SAYING THIS CALL BEGAN AS A FACT-FINDING CALL, THAT  
2 THAT WOULD THEN INSULATE ANYTHING THAT HAPPENED IN THE CALL  
3 EVEN IF IT WAS NOT THIS DIRECT FACT-FINDING THAT IT STARTED AS.  
4 AND THAT SEEMS TO BE WHAT YOU'RE ARGUING TO ME.

5 MR. LEA: ABSOLUTELY NOT. WE ARE NOT ARGUING THAT  
6 IT'S ABOUT HOW THE CALL STARTS. WE'RE SAYING, (A), THAT  
7 THERE'S NONE OF THAT IN THE RECORD AND -- OTHER THAN  
8 IMPLICATIONS ABOUT INTENT WHICH ARE OFF THE RECORD. BUT, (B),  
9 IF THE COURT HAD, IF THEY CAME FORWARD WITH SOME INDICATION  
10 THAT THAT'S ACTUALLY WHAT HAPPENED, THE COURT WOULD ULTIMATELY  
11 HAVE TO MAKE THE CALL ABOUT WHETHER THOSE PARTS OF THE  
12 CONVERSATION WOULD BE PARSED OUT. WE JUST DON'T HAVE THAT AT  
13 ALL HERE OTHER THAN IMPLICATIONS ABOUT INTENT, WHICH EASTLAND  
14 AND THE MANY OTHER CASES MAKE --

15 THE COURT: BUT I THINK THAT WE DO HAVE THAT HERE, AT  
16 LEAST IN SOME PART, AND THAT'S PROBABLY WHY WE'RE TALKING  
17 CROSSWAYS, IS THAT WE DO HAVE THIS IMPLICATION THAT SENATOR  
18 GRAHAM WAS TELLING SECRETARY RAFFENSPERGER TO DO THINGS AND  
19 TELLING HIM TO POTENTIALLY RE-EXAMINE BALLOTS, THAT THERE'S  
20 SOMETHING IN THE SUBPOENA TO CHANGE THE PROCESS TO MAKE IT MORE  
21 FAVORABLE TO PRESIDENT TRUMP. SO IF THAT IN FACT IS PART OF  
22 WHAT HAPPENED IN THIS PHONE CALL, THEN HOW IS THAT LEGISLATIVE?  
23 AND I UNDERSTAND YOU SAY THAT THERE'S NO PROOF OF THAT, BUT  
24 THAT IS A SUBJECT MATTER THAT THEY INTEND TO ASK THE SENATOR  
25 ABOUT. SO WHY IS THAT LEGISLATIVE?

1           MR. LEA: THEY HAVE COME FORWARD -- THE CLAUSE IS  
2 ABSOLUTE. THEY HAVE COME FORWARD WITH NOTHING TO SUGGEST THAT.  
3 AND THE WORD YOUR HONOR USED IS THE KEY POINT, IMPLICATION.  
4 THAT IS ABOUT HOW SECRETARY RAFFENSPERGER READ SENATOR GRAHAM'S  
5 INTENT. EVERYBODY AGREES THAT IT WAS QUESTION -- PUTTING ASIDE  
6 THE SUBPOENA. THAT'S THEIR -- THE PETITION, THAT'S THEIR  
7 GLOSS, BUT THE ACTUAL THINGS THAT HAVE BEEN SUBMITTED,  
8 EVERYBODY SAYS, WE TALKED ABOUT ELECTORAL SECURITY. WE TALKED  
9 ABOUT ELECTORAL PROCESS. AND THEN SECRETARY OF STATE  
10 RAFFENSPERGER SAYS TWO DIFFERENT THINGS. THEY AMOUNT TO THE  
11 SAME THING. IT SEEMED LIKE HE WANTED ME TO DO SOMETHING ELSE,  
12 WITHOUT SAYING HE ASKED ME TO DO SOMETHING ELSE. AND THEN THE,  
13 IN HIS WORDS, IMPLICATION OR HE IMPLIED, I SHOULD DO SOMETHING  
14 ELSE, WITHOUT SAYING HE HAS TO DO SOMETHING ELSE. THAT  
15 DOVETAILS RIGHT BACK TO MOTIVE, AND THAT IS EXACTLY WHAT THE  
16 SUPREME COURT SAYS NOT TO ADDRESS AT ALL.

17           THE COURT: WELL, TWO POINTS. ONE, IS THAT I THOUGHT  
18 THAT YOU CITED TO ME A NEWS STORY WHERE SENATOR GRAHAM SAYS  
19 THAT HE SUGGESTED TO ELECTIVE OFFICIALS TO DO CERTAIN THINGS,  
20 WHICH ALSO SEEMS CONSISTENT WITH SECRETARY RAFFENSPERGER'S  
21 ACCOUNT. SO I'VE GOT THAT IN THE RECORD THAT YOU ALL PROVIDED,  
22 SO THERE IS SOMETHING IN THE RECORD WHERE SENATOR GRAHAM DOES  
23 SAY THAT HE SUGGESTED CHANGES IN THE WAY THEY WERE DOING THINGS  
24 AS PART OF THIS ELECTION PROCESS. TO ME IT DOESN'T SOUND AT  
25 ALL LIKE THIS QUOTE REFERS TO SENATOR GRAHAM TALKING ABOUT

1 FUTURE LEGISLATION. IT TALKS ABOUT WHAT THEY SHOULD DO, WHICH  
2 IS NOT A FEDERAL THING. IT'S WHAT THE STATE IS DOING. SO  
3 THERE IS SOME EVIDENCE IN THE RECORD ABOUT THAT. IT DOESN'T  
4 SEEM LIKE IT'S JUST MADE UP THAT THERE WAS THIS CONVERSATION  
5 WHERE SENATOR GRAHAM MADE SOME SORT OF SUGGESTION.

6 MR. LEA: I BELIEVE THE QUOTE, AND I -- IT'S TOUGH TO  
7 SAY. I DON'T WANT TO GUESS FOR SURE. BUT THERE'S ONE QUOTE  
8 THAT SAYS, HOW WE CAN MAKE IT BETTER. IT'S A SENATOR SAYING,  
9 THAT IS, TALKING ABOUT A LEGISLATIVE FIX.

10 THE COURT: IT SAYS, YOU CAN MAKE IT BETTER. WELL,  
11 OKAY. I'LL LOOK AT IT AGAIN LATER. BUT THE QUOTE I HAVE IS  
12 THAT YOU CAN MAKE IT BETTER, TALKING TO THE ELECTION OFFICIAL.

13 MR. LEA: REGARDLESS, IT SEEMS TO BE THAT HE'S  
14 TALKING ABOUT A WAY TO IMPROVE THE ELECTORAL PROCESS THROUGH  
15 LEGISLATION. AND THIS IS NOT A STATE ISSUE. THE CONSTITUTION  
16 GIVES CONGRESS THE RIGHT TO CHANGE STATE ELECTORAL LAWS. MY  
17 FRIENDS DO CITE THE PROVISION THAT DISCUSSES STATE POWER OVER  
18 ELECTION, BUT THEY LEAVE OFF THE LAST PART OF THAT SENTENCE,  
19 WHICH IS THAT CONGRESS CAN CHANGE THEM AS IT SEES FIT. SO THIS  
20 WAS A LEGISLATIVE ISSUE FOR SENATOR GRAHAM TO INQUIRE ABOUT.  
21 I'M NOT SURE OF THE PRECISE WORD IN THE CALL. YOUR HONOR HAS  
22 MADE ME DOUBT MYSELF, BUT I THINK IT'S "WE," HOW WE CAN MAKE IT  
23 BETTER. BUT EITHER WAY, I THINK HE'S REFERRING TO A  
24 LEGISLATIVE CHANGE. IT'S TOUGH TO SAY WITHOUT KNOWING THE  
25 PRECISE VIDEO, AND I --

1           THE COURT: WELL, I'LL LOOK AT IT AGAIN WITH YOUR  
2 EXPLANATION AND MINE. NOW, ANOTHER ISSUE THAT YOU TALK ABOUT  
3 IS MOTIVE AND HOW THE COURT CAN'T INQUIRE AS TO MOTIVE. AND I  
4 DO WANT TO ASK YOU ABOUT THAT BECAUSE I THINK IT'S IMPORTANT.  
5 AND THE EASTLAND CASE IS KIND OF WHERE YOU GO WITH THAT, AT  
6 LEAST AS A STARTING POINT. AND IN EASTLAND IT TALKS ABOUT --  
7 AND I THINK THE QUOTE RIGHT HERE IS, "THAT IT'S CLEAR THAT IN  
8 DETERMINING THE LEGITIMACY OF A CONGRESSIONAL ACT, WE DO NOT  
9 LOOK AT THE MOTIVES ALLEGED TO HAVE PROMPTED IT." AND I  
10 UNDERSTAND THAT. TO ME IT'S CLEAR THAT ONCE WE DETERMINE  
11 SOMETHING IS LEGISLATIVE, THEN THERE IS NO INQUIRY INTO THE  
12 MOTIVES OF THE LEGISLATIVE ACT.

13           NOW, TO ME IT'S POTENTIALLY A DIFFERENT QUESTION ABOUT HOW  
14 TO DETERMINE IF SOMETHING IS POLITICAL OR LEGISLATIVE. SO IN  
15 LOOKING AT WHAT TYPE OF ACT SOMETHING IS, THERE'S GOT TO BE  
16 SOME EXAMINATION OF WHY IT IS DONE. BECAUSE IF IT'S DONE FOR  
17 POLITICAL REASONS, IT'S DOWN ONE TRACK. IF IT'S DONE FOR  
18 LEGISLATIVE REASONS, IT'S DOWN ANOTHER TRACK. SO YOU KEEP  
19 SAYING THAT IT'S IMPROPER FOR THE COURT TO LOOK AT MOTIVE, BUT  
20 HOW CAN I CLASSIFY AN ACT AS POLITICAL OR LEGISLATIVE WITHOUT  
21 KNOWING WHY THE ACT WAS DONE?

22           MR. LEA: VERY EASILY, YOUR HONOR. PUT ASIDE  
23 QUESTIONS AND MOTIVE, LOOK AT WHAT WAS SAID, THE COLD, HARD  
24 FACTS OR, IN THIS CASE, WHAT -- HOW IT'S BEEN DESCRIBED BASED  
25 ON WHAT'S IN THE RECORD, AND THEN MAKE THE DECISION BASED ON



1 THAT, AND MOTIVE CAN'T CHANGE THE ANALYSIS. IT'S AN OBJECTIVE  
2 STANDARD NO DIFFERENT THAN THIS COURT I'M SURE HAS APPLIED IN  
3 MANY OTHER CONTEXT (VERBATIM). YOU TAKE THE FACTS, YOU DON'T  
4 READ INTO THE INTENT BEHIND THEM, AND INSTEAD YOU DECIDE BASED  
5 ON THOSE FACTS WHAT DO YOU HAVE. AND THAT MAKES IT WHERE YOU  
6 CAN CLASSIFY IT IF IT'S FAIRLY DESCRIBABLE AS LEGISLATIVE IN  
7 THE WORD OF THE DOWDY CASE. AND HERE --

8 THE COURT: I DON'T HAVE FACTS, AND THAT'S WHAT TO ME  
9 IS A STUMBLING BLOCK. BECAUSE IF, FOR EXAMPLE, I KNEW THAT  
10 SENATOR GRAHAM SAID SOMETHING LIKE, A HUNDRED PERCENT OF THE  
11 REASON I MADE THAT CALL WAS BECAUSE I WAS LOOKING AT X, Y AND  
12 Z, THEN THOSE WOULD BE SOME FACTS. IF HE SAYS, A HUNDRED  
13 PERCENT OF THE REASON WHY I COORDINATED WITH THE TRUMP CAMPAIGN  
14 WAS BECAUSE I WAS INVESTIGATING ELECTION IRREGULARITIES AND  
15 THERE WASN'T ANYTHING ELSE GOING ON, THAT MIGHT BE FACTS. BUT  
16 I DON'T KNOW THE ANSWERS TO THE QUESTIONS. SO IT'S VERY  
17 DIFFICULT TO DETERMINE WHAT BUCKET THESE FIT IN WITHOUT FACTS.

18 MR. LEA: IF I MIGHT, YOUR HONOR, I THINK THAT THAT  
19 MISCONCEIVES HOW TO LOOK AT FACTS. IT'S NOT FACTS ABOUT  
20 MOTIVATION. THAT'S WHAT EASTLAND AND THE OTHER CASES TAKE OFF  
21 THE TABLE. IT'S THE UNDERLYING FACTS ABOUT THE COMMUNICATION  
22 REGARDLESS OF MOTIVATION. SO IT'S NOT A QUESTION OF WHAT --  
23 FACTS RELATED TO WHAT SENATOR GRAHAM SAYS HE DID OR DID NOT  
24 MEAN TO DO. IT'S FACTS ABOUT WHAT TOPICS WERE COVERED IN THE  
25 MEETING. AND YOU DO HAVE THOSE. THEY HAVE CHOSEN TO PUT THOSE

1 IN THE RECORD. THEY MATCH UP WITH OURS. IT'S A CONVERSATION  
2 ABOUT HOW TO VERIFY ABSENTEE BALLOTS AND ELECTORAL INTEGRITY.  
3 AND THAT'S CLEARLY AN ISSUE -- I DON'T WANT TO BELABOR THE  
4 POINT IF THE COURT DOESN'T HAVE A QUESTION ABOUT IT, BUT IT IS  
5 CLEARLY AN ISSUE THAT CAN BE COVERED --

6 THE COURT: WELL, AND I DON'T THINK YA'LL AGREE.  
7 THAT'S WHERE I THINK THAT THERE'S A PROBLEM HERE. BECAUSE I  
8 DON'T THINK THEY AGREE THAT IT WAS JUST INFORMATION-GATHERING.  
9 I THINK THEY ARE TAKING THE POSITION THAT SENATOR GRAHAM TOLD  
10 PEOPLE TO DO THINGS. AND I ALSO DON'T AGREE THAT THEY READ THE  
11 SUBPOENA AS NARROWLY AS YOU DO. I DON'T THINK THEY'RE JUST  
12 ASKING ABOUT WHAT HAPPENED IN TERMS OF WHAT WAS DISCUSSED ON  
13 THE PHONE CALL. IT'S MUCH BROADER THAN THAT. SO I DON'T THINK  
14 THAT THAT IS -- IF YOU BOTH DID AGREE THAT THE ONLY QUESTIONS  
15 THAT WERE GOING TO BE ASKED HAD TO DO WITH WHAT THE CALL WAS  
16 ABOUT AND IT WAS ALL ABOUT INFORMATION-GATHERING, THERE WOULD  
17 BE VERY LITTLE DISPUTE HERE. BUT THAT'S NOT AT ALL WHAT I SEE  
18 THE ISSUE TO BE. IT'S HOW YOU DEFINE THE ISSUE, BUT I DON'T  
19 THINK IT'S HOW IT HAS BEEN OTHERWISE DEFINED.

20 MR. LEA: I WOULD SAY THAT THEY CERTAINLY DISAGREE OR  
21 AT LEAST CAST UNCITED SORT OF STATEMENTS THAT THEY WOULD TAKE A  
22 POSITION OBVIOUSLY THAT IT WAS DIFFERENTLY MOTIVATING. BUT ON  
23 THE CORE FACTS ABOUT WHAT WAS DISCUSSED -- AND MY POINT THERE,  
24 I UNDERSTAND YOUR HONOR'S POINT THAT THEY DEFINE THE ISSUE  
25 DIFFERENTLY. MY SUBMISSION IS THAT THE SUPREME COURT HAS SAID

1 THAT'S HOW YOU GO ABOUT THE ANALYSIS. YOU LOOK AT THE  
2 OBJECTIVE FEATURES OF THE CONVERSATION OR THE EVENT OR WHATEVER  
3 IT WAS AND YOU MAKE THE CALL BASED ON THAT. I REALLY DO THINK  
4 THE SUPREME COURT'S DECISION -- I WOULD COMMIT IT TO YOU THE  
5 SUPREME COURT'S DECISION IN BOGAN HARRIS WHERE THEY LITERALLY  
6 SAY THE QUESTION IS WHETHER STRIPPED OF ALL CONSIDERATIONS OF  
7 MOTIVE, THE ACT CAN BE FAIRLY DESCRIBED AS LEGISLATIVE. SO ALL  
8 OF THAT DISAGREEMENT TO WHICH YOUR HONOR REFERENCES JUST FALLS  
9 AWAY BECAUSE WE HAVE A LEGISLATIVE CALL.

10 THE COURT: WHY DON'T I LOOK AT WHAT THE SUBPOENA IS  
11 ASKING HIM TO TALK ABOUT RATHER THAN HOW YOU DESCRIBE THE  
12 CONTENTS OF THE CALL? BECAUSE WHAT IS -- AT LEAST WHAT YOU  
13 CITED IN YOUR BRIEF AS KIND OF WHAT I LOOK AT THE SCOPE OF THE  
14 SUBPOENA, IS BASICALLY ON THE CERTIFICATE OF MATERIAL WITNESS.  
15 AND IT TALKS ABOUT THAT THE SUBSTANCE OF THE TELEPHONE CALLS,  
16 WHICH IS WHAT YOU'VE REFERRED TO, BUT IT ALSO TALKS ABOUT THE  
17 LOGISTICS OF SETTING UP THE CALL, COMMUNICATIONS BETWEEN  
18 HIMSELF AND OTHERS INVOLVED IN THE PLANNING AND EXECUTION OF  
19 THE TELEPHONE CALLS, THE TRUMP CAMPAIGN AND OTHER KNOWN AND  
20 UNKNOWN INDIVIDUALS TRYING TO INFLUENCE THE ELECTION. AND SO I  
21 DON'T SEE THAT THIS IS ONLY LIMITED TO THE TWO CALLS. I DON'T  
22 SEE THAT ANYWHERE. I JUST SEE THAT THERE'S A REFERENCE THAT  
23 THERE WERE AT LEAST TWO CALLS, BUT I DON'T SEE THAT THIS IS  
24 ONLY LIMITED TO THE SUBSTANCE OF THOSE TWO CALLS.

25 MR. LEA: SO THE ANSWER TO THAT IN TWO PARTS. THE

1 QUESTIONS ABOUT LOGISTICS OR COMMUNICATIONS WHICH IN THE  
2 CERTIFICATE ARE THE -- THE FOLLOW-ON COMMUNICATIONS ARE TIED TO  
3 THE CALLS, THAT RISES OR FALLS WITH THE CALLS THEMSELVES  
4 BECAUSE THAT WOULD BE PART OF THE INVESTIGATION AS WELL.  
5 AMICI'S OWN CASES, EVEN ONES THAT ARE BASED ON MORE QUALIFIED  
6 DOCTRINES UNLIKE ABSOLUTES, MUTUAL DEBATE, ACKNOWLEDGE THAT YOU  
7 CAN'T BACKDOOR YOUR WAY IN BY SAYING THE LEGISLATIVE PART OF  
8 THE INVESTIGATION WAS COVERED, BUT WE WANT TO ASK ABOUT WHAT  
9 YOU SAID AFTER THE FACT AS YOU DISCUSSED IT WITH OTHERS BECAUSE  
10 YOU CAN'T KIND OF BACKDOOR YOUR WAY INTO THE MOTIVE. SO THAT'S  
11 ONE BUCKET, THOSE THINGS THAT ARE SURROUNDING THE CALLS OR  
12 COVERED BY THE CALLS. AND THEN ALL YOU HAVE LEFT IS A BROAD  
13 ASSERTION THAT THEY WANT TO ASK IF HE WAS COORDINATING IN SOME  
14 WAYS WITH OTHERS, AND THAT'S JUST A FISHING EXPEDITION THAT  
15 THEY'VE NEVER INDEPENDENTLY DEFENDED HERE. AND SO, I MEAN, FOR  
16 INSTANCE THERE ARE ADDITIONAL SOURCES OF INFORMATION. WELL,  
17 YOU CAN'T JUST DEFEAT THE SPEECH OR DEBATE CLAUSE BY DIVORCING  
18 A REQUEST LIKE THAT FROM ANYTHING. INSTEAD, YOU LOOK FOR THE  
19 CALLS AND WHAT THE MEAT OF IT WAS, AND THAT IS ABOUT THE  
20 INFORMATION-GATHERING PROCESS. YOU DID MENTION GRAVEL AND  
21 JOHNSON AND BREWSTER, SO I WANT TO MAKE SURE I ANSWER THE  
22 COURT'S QUESTIONS ABOUT THAT. AND I'LL --

23 THE COURT: WELL, AND I THINK THAT THOSE CASES, TO  
24 ME, STAND FOR THE PROPOSITIONS THAT SOMETHING CAN'T BE JUST  
25 LEGISLATIVE BY SOMEONE SAYING THAT THIS IS RELATED TO A

1 LEGISLATIVE ACTIVITY, THAT WHEN YOU'RE ASKING PEOPLE TO DO  
2 THINGS, THAT THAT IS POTENTIALLY DIFFERENT. YOU'VE GOT IN  
3 BREWSTER THIS -- THEY'RE USING OLD-FASHIONED WORDS, BUT THE  
4 CAJOLING AND EXHORTING OF PEOPLE. AND CERTAINLY I SEE AN  
5 ARGUMENT FROM THE D.A.'S OFFICE THAT TRYING TO GET  
6 RAFFENSPERGER TO DO THINGS WAS EXHORTING AND CAJOLING, WHICH IS  
7 OUTSIDE THE SPEECH AND DEBATE CLAUSE. I'M LESS IMPRESSED BY  
8 THE D.A.'S ARGUMENT THAT THERE IS AN ABSOLUTE EXCEPTION TO  
9 THIRD-PARTY CRIMINAL ACTIVITY. I THINK IT'S MORE NUANCE THAN  
10 THAT, BUT I DO THINK THAT YOU GO BACK TO THIS IDEA THAT ONCE  
11 SOMETHING IS FOUND TO BE LEGISLATIVE, IT'S A PRETTY EASY  
12 ANSWER. BUT TRYING TO FIGURE OUT IF SOMETHING IS POLITICAL OR  
13 LEGISLATIVE, AND IT'S LEGISLATIVE VERSUS RELATING TO  
14 LEGISLATIVE, IS A VERY DIFFICULT INQUIRY. AND IT APPEARS THAT  
15 SOME OF THESE SUBJECTS, AT LEAST ON THEIR FACE, TO ME, FIT MORE  
16 CLOSELY UNDER THIS POLITICAL REALM. BUT I DON'T REALLY SEE ANY  
17 LAW ABOUT KIND OF WHAT IS POLITICAL VERSUS LEGISLATIVE BECAUSE  
18 IT APPEARS THAT JUST BY SAYING, I'M GATHERING INFORMATION, THAT  
19 KIND OF ANYTHING CAN KIND OF GO DOWN THAT ROAD. I MEAN,  
20 SOMEONE CAN SAY, I'M GATHERING INFORMATION BECAUSE I WANT TO  
21 PASS LEGISLATION ABOUT WEAPONS, SO I TRIED TO SEE IF I COULD  
22 BUY A WEAPON ON THE PHONE CALL. I MEAN, IT CAN GO WAY FAR  
23 AFIELD WHEN YOU SAY, I'M JUST GATHERING INFORMATION. SO THAT'S  
24 THE PIECE THAT'S HANGING ME UP MOST ABOUT THESE BREWSTER AND  
25 GRAVEL CASES, IS THAT IT APPEARS THAT YOU WANT KIND OF

1 EVERYTHING TO BE SWEEPED UNDER THIS IDEA OF LEGISLATION.

2 MR. LEA: SO, FIRST, TO TAKE THE REFERENCE TO  
3 CAJOLING, I ACKNOWLEDGE THAT THAT LANGUAGE IS IN THE SUPREME  
4 COURT OPINIONS. I WANT TO BE CLEAR THAT THAT IS DICTA, THE  
5 COURT HAS NEVER ACTUALLY CONFRONTED THAT, AND THAT IS A FAIR  
6 PART OF AN INVESTIGATION, IS CALLING AN EXECUTIVE BRANCH  
7 OFFICER AND SAYING, CAN YOU FIX THIS? IF NOT, WE'RE GOING TO  
8 NEED LEGISLATION BECAUSE CLEARLY THE OLD LAW IS NOT DOING THE  
9 WORK. THAT SAID, THAT'S NOT WHAT'S HAPPENING HERE. AND I DO  
10 REALIZE I'M DOVETAILING BACK INTO INTENT BEING OFF THE TABLE,  
11 BUT ALL THEIR CLAIM ABOUT CAJOLING IS BASED ON AN IMPLICATION  
12 IN THE CONVERSATION FROM SECRETARY RAFFENSPERGER, WHICH IS NOT  
13 A HARD FACT.

14 I DO WANT TO REFERENCE GRAVEL. HALF OF THEIR BRIEF GETS  
15 IT RIGHT. HALF OF THEIR BRIEF RECOGNIZES THAT GRAVEL'S NOT  
16 REALLY AN EXCEPTION AT ALL BECAUSE YOU CAN'T ASK ABOUT  
17 LEGISLATIVE ACTS. AND SO WE'RE RIGHT BACK TO TALKING WITH YOUR  
18 HONOR ABOUT WHAT IS OR IS NOT A LEGISLATIVE ACT. THE BACK HALF  
19 SEEMS TO ASK FOR SOME SORT OF ILL-DEFINED EXCEPTION. AND THERE  
20 IS NO EXCEPTION BECAUSE GRAVEL JUST SAID, GOT A NATIONAL  
21 SECURITY CASE, SENATOR CAME BY THE PENTAGON PAPERS IN SOME  
22 ILLEGAL FASHION, NOT SAYING HE DID IT, BUT SOMEBODY CLEARLY  
23 COMMITTED THE CRIME. THEY MADE ARRANGEMENTS TO PUBLISH IT.  
24 AND THE COURT IS BASICALLY SAYING YOU CAN'T LAUNDER A  
25 PRE-EXISTING, INDEPENDENT CRIME THROUGH THE INVESTIGATION

1 PROCESS. THAT'S NOT WHAT WE HAVE HERE. HERE WE'RE DEBATING  
2 ABOUT WHETHER THIS WAS AN INVESTIGATION AT ALL. THEY'RE GOING  
3 AFTER THE LEGISLATIVE ACT ITSELF. IT WOULD BE LIKE GOING AFTER  
4 THE COMMITTEE SPEECH IN GRAVEL. SO WHEN YOU UNDERSTAND GRAVEL  
5 THAT WAY, IT'S CONSISTENT WITH BREWSTER.

6 THE COURT: BUT IF WE GO WITH WHAT SECRETARY  
7 RAFFENSPERGER INDICATES THE CALL WAS ABOUT, IT FITS VERY NEATLY  
8 UNDER GRAVEL IN SOME RESPECTS BECAUSE IT SOUNDS LIKE SENATOR  
9 RAFFENSPERGER (VERBATIM) AT LEAST IS STATING THAT HE FELT  
10 INTIMIDATED AND THAT THERE WAS SOME ATTEMPT TO GET HIM TO  
11 CHANGE OR TO REJECT LEGAL BALLOTS. SO FROM THAT STANDPOINT  
12 THERE IS A PATHWAY AND APPARENTLY SWORN TESTIMONY UNDER OATH  
13 THAT BACKS THIS THAT MAKES IT ALMOST EXACTLY LIKE GRAVEL.

14 MR. LEA: I ASSUME IF THEY HAD THAT, THEY WOULD HAVE  
15 COME FORWARD WITH IT. INSTEAD, ALL THEY HAVE COME FORWARD  
16 WAS (VERBATIM) A STATEMENT THAT, WE DISCUSSED ELECTORAL  
17 PROCESS. IT WAS IMPLIED OR IT SEEMED LIKE HE WANTED ME TO TAKE  
18 ACTION. SO WE'RE RIGHT BACK TO SAYING THAT IS ABOUT INTENT,  
19 WHICH IS LITERALLY SINCE THE KIMBROUGH -- I'M GOING TO  
20 MISPRONOUNCE IT -- BUT FROM 1880 RIGHT THROUGH EASTLAND AND  
21 EVEN TO TODAY WHAT IS SUPPOSED TO BE OFF THE TABLE. AND IT  
22 MAKES SENSE BECAUSE THIS IS IMMUNITY. YOU'RE NOT SUPPOSED TO  
23 BE ABLE TO PIERCE IT JUST BY SAYING, I THINK SOMEBODY DID THIS  
24 FOR A BAD REASON. AND SO YOU LOOK AT IT OBJECTIVELY. THEY  
25 HAVE MADE THIS OTHER ARGUMENT -- AND I DON'T WANT TO LEAVE IT

1 ON THE TABLE IF YOUR HONOR HAS QUESTIONS ABOUT IT -- ABOUT THE  
2 IDEA THAT YOU WOULD NEED SOME --

3 THE COURT: WELL, I WANT TO GO BACK TO THIS POLITICAL  
4 ISSUE.

5 MR. LEA: OKAY.

6 THE COURT: IF SOME OF THESE SUBJECTS ARE NOT  
7 POLITICAL, EXPLAIN TO ME WHAT YOU BELIEVE THE SUPREME COURT  
8 MEANT BY SAYING POLITICAL ACTIONS ARE NOT SUBJECT TO THIS  
9 IMMUNITY BECAUSE I'VE GOT THE STATEMENT THAT POLITICAL ACTIONS  
10 AREN'T PROTECTED. WE'VE GOT QUESTIONS ABOUT COORDINATIONS WITH  
11 THE TRUMP CAMPAIGN. THAT, TO ME, RAISES AT LEAST AN ISSUE AS  
12 TO WHETHER THAT IS POLITICAL. WHY IS THAT NOT POLITICAL?

13 MR. LEA: TO LOOK AT THE STATEMENT ABOUT  
14 COORDINATION, IT'S IN REFERENCE TO THE CALL. THEY CLAIM THAT  
15 SOMEHOW THE INVESTIGATION INVOLVED THEM AS WELL, BUT THAT'S  
16 ANOTHER STATEMENT ABOUT INTENT. YOU CAN'T JUST PIERCE IT BY  
17 TACKING ON -- THEY'VE OFFERED NO STATEMENT, NO FACT TO SUPPORT  
18 THE IDEA THAT THERE WAS COORDINATION. AND SO WE'RE RIGHT BACK  
19 TO TALKING ABOUT AN INVESTIGATORY TALL (VERBATIM), WHICH  
20 THEY'VE THEN APPENDED REFERENCE TO, WE THINK IT MIGHT HAVE BEEN  
21 COORDINATED. IF THAT IS THE SPEECH OR DEBATE CLAUSE, IT IS A  
22 PAPER TIRE BECAUSE ANYBODY CAN TACK ON A STATEMENT OF INTENT TO  
23 THE END OF A PETITION, AN EX PARTE PETITION FOR A SUBPOENA TO  
24 TRY TO GET IT.

25 I DID MISS ONE POINT IN THE CRIMINAL DISCUSSION. YOU



1 MENTIONED THE SCOPE OF A POTENTIAL CRIMINAL EXCEPTION. WE  
2 DON'T THINK GRAVEL CREATES IT. I DO WANT TO HIGHLIGHT AGAIN --  
3 I WAS SURPRISED BY THEIR RESPONSE. THEY WENT FULL SCALE ON  
4 THIS IDEA THAT THERE'S A FORMAL CRIMINAL EXCEPTION  
5 CROSS-CUTTING ALL THESE DOCTRINES. THEY'VE GOT A CIVIL GRAND  
6 JURY UNDER GEORGIA LAW. THEY CHOSE THAT OPTION PRESUMABLY  
7 BECAUSE IT BRINGS THEM SOME BENEFITS. IT HAS A LONGER  
8 DURATION. PRESUMABLY THERE'S SOME OTHER PROCEDURAL FEATURES  
9 THEY THINK BENEFICIAL. BUT HAVING CHOSEN TO DO THAT, THEY  
10 CAN'T THEN INVOKE AN ACROSS-THE-BOARD, CUTTING, CRIMINAL  
11 EXCEPTION TO A BUNCH OF IMMUNITIES. AND SO EVEN IF THE COURT  
12 WERE INCLINED TO DEBATE WHETHER THERE IS SOME SORT OF CRIMINAL  
13 EXCEPTION THAT WOULD ALLOW PEERING INTO LEGISLATIVE ACTS, THIS  
14 ISN'T EVEN THAT CASE. AND SO THAT'S VERY EASY TO SOLVE. THE  
15 KENERLY CASE FROM THE GEORGIA COURT OF APPEALS HAS BEEN VERY,  
16 VERY CLEAR ON THAT. AND FEDERAL COURTS HAVE DEFERRED TO STATE  
17 COURTS ON THE MEANING OF STATE STATUTES SINCE WELL BEFORE  
18 EERIE (PHONETIC). AND SO --

19 THE COURT: WELL, AND I'M KIND OF BACK TO I DON'T  
20 KNOW THAT I AGREE THAT THERE'S THIS HARD CORE, CRIMINAL  
21 EXCEPTION, BUT I DO THINK WHETHER SOMETHING IS CRIMINAL  
22 CERTAINLY INFORMS ON WHETHER IT IS LEGISLATIVE OR NOT. I DON'T  
23 THINK THERE CAN BE AN ARGUMENT THAT SOMETHING THAT IS CRIMINAL  
24 IS LEGISLATIVE, ESPECIALLY WHEN YOU GO BACK TO THE FACTS OF THE  
25 BREWSTER CASE. SO IF THERE IS AN ALLEGATION THAT -- AND I

1 DON'T KNOW -- IT'S, AGAIN, WE GO BACK TO I DON'T KNOW WHAT THE  
2 ANSWERS TO ALL THESE QUESTIONS ARE, BUT IF THERE ARE  
3 CONVERSATIONS WHERE PEOPLE ARE DOING CRIMINAL THINGS AND THAT'S  
4 PART OF WHAT'S HAPPENING, I MEAN, WHY WOULD THAT BE A PART OF  
5 THE LEGISLATIVE PROTECTION?

6 MR. LEA: TWO ANSWERS. ONE, IS THE SUPREME COURT HAS  
7 ANSWERED THAT. THEY HAVE ACKNOWLEDGED THAT THIS BROAD AND  
8 ABSOLUTE AND IN THEIR MIND INDISPENSABLE PRIVILEGE -- IMMUNITY,  
9 I SHOULD SAY, WILL LET SOME BAD THINGS HAPPEN, INCLUDING  
10 CRIMES. IT WILL LET PEOPLE OFF THE HOOK. THEY REFER TO  
11 SENATORS, OR PARLIAMENTARIANS IN THE OLD DAYS, DESTROYING  
12 PEOPLE THROUGH THE IMMUNITY. AND THEY HAVE CHOSEN TO STRIKE  
13 THE BALANCE THAT WAY. BREWSTER IS IN NO WAYS INCONSISTENT WITH  
14 THAT. YOU DON'T JUST GET TO PIERCE IT AND SAY, YEAH, IT WAS  
15 LEGISLATIVE ACTIVITY FORMALLY, BUT IT WAS PART OF A CRIME.  
16 INSTEAD, WHAT BREWSTER SAID --

17 THE COURT: NO. IT'S DIFFERENT. IT'S NOT THAT IT'S  
18 LEGISLATIVE ACTIVITY, BUT THE QUESTION IS, IS IT LEGISLATIVE  
19 ACTIVITY. AND SO IF SOMETHING IS CRIMINAL, HOW CAN THAT BE  
20 LEGISLATIVE ACTIVITY?

21 MR. LEA: BECAUSE YOU LOOK AT THE OBJECTIVE FACTS.  
22 AND HERE THE ONLY OBJECTIVE FACTS THEY POINTED TO ARE QUESTIONS  
23 ABOUT ELECTORAL PROCESS. YOU DON'T IMPLY (VERBATIM) ABOUT  
24 MOTIVE. BREWSTER IS DIFFERENT BECAUSE THERE THE COURT SAID A  
25 PROMISE TO DO A LEGISLATIVE ACT IN THE FUTURE IN EXCHANGE FOR

1 MONEY IS AN INDEPENDENT CRIME IRRESPECTIVE OF WHAT HAPPENS  
2 LATER WITH A LEGISLATION BEING PASSED. AND THEY SAID THAT IS  
3 ENTIRELY OUTSIDE. GRAVEL THEN TOOK THAT A STEP FURTHER AND  
4 SAID YOU CAN'T ALSO MUG SOMEBODY TO STEAL DOCUMENTS AND THEN  
5 READ THEM ON THE FLOOR OF THE SENATE AND EXPECT TO NOT GET  
6 PROSECUTED. AND SO THOSE ARE CASES ACKNOWLEDGING THAT IF YOU  
7 HAVE A CLEARLY -- A LEGISLATIVE ACT UNDER THE TEST, UNDER THE  
8 OBJECTIVE TEST, YOU CAN'T INQUIRE INTO THAT, BUT YOU CAN'T TAKE  
9 A CRIME OUTSIDE, READ IT INTO THE RECORD AND THEN GET  
10 NOT (VERBATIM) PROSECUTED FOR THE CRIME. THIS CASE JUST ISN'T  
11 THAT BECAUSE EVERYTHING WE'RE TALKING, AT LEAST AS FAR AS THEY  
12 HAD COME FORWARD AND IS REFLECTED IN THEIR PETITION, IS TIED UP  
13 IN THIS PHONE CALL. AND IF YOU LOOK AT THAT OBJECTIVELY,  
14 THAT'S LEGISLATIVE ACTIVITY. AND SO THAT'S REALLY WHERE WE  
15 SEEM TO COME DOWN TO, IS ABOUT THE OBJECTIVE NATURE OF THE  
16 ANALYSIS. AND HERE BOTH SIDES HAVE PUT FORWARD INDICATIONS OF  
17 WHAT EXACTLY THAT WAS. AND IT WAS A QUESTION ABOUT ELECTORAL  
18 PROCESS.

19 AND JOHNSON -- LAST POINT ON THIS, YOUR HONOR. JOHNSON  
20 SHOULD BE READ ALONGSIDE BREWSTER BECAUSE IT KIND OF MAKES THIS  
21 POINT CLEAR. BREWSTER CAME ALONG LATER, SAID YOU CAN'T HAVE A  
22 BRIBE AND THEN LATER SAY IT WAS LEGISLATIVE BECAUSE I VOTED FOR  
23 AN ACT LATER. AND THEY SAID, WELL, THE CRIME STANDS ON ITS OWN  
24 AND OUTSIDE THE LEGISLATIVE PROCESS. JOHNSON WAS A LITTLE  
25 DIFFERENT BECAUSE THEY TRIED TO PROVE THE EQUIVALENT TO A

1 BRIBE, BUT THEN THEY USED A BUNCH OF EVIDENCE SAYING INFER FROM  
2 THIS LEGISLATIVE ACTIVITY, IN THAT CASE A SPEECH, THAT HE WAS  
3 DOING THIS FOR THESE UNTOWARD REASONS. AND THE DIFFERENCE IS  
4 THE COURT SAID, WELL, NO, THAT'S NOT INDEPENDENT IN ANY WAY.  
5 YOU'RE CHALLENGING THE LEGISLATIVE ACT AS A CRIME. SO THE  
6 DETERMINATION OF WHETHER IT'S A LEGISLATIVE ACT IS OBJECTIVE  
7 AND IT PRECEDES THE ANALYSIS OF WHETHER THE CRIME APPLIES OR  
8 NOT. YOU CAN'T CUT THROUGH IT WITH A CRIMINAL EXCEPTION. I  
9 DON'T WANT TO -- WE HAVE OTHER IMMUNITIES. I'M HAPPY TO  
10 ADDRESS THOSE OR TO ANSWER QUESTIONS.

11 THE COURT: NO. BEFORE WE GET OFF THAT, A COUPLE  
12 MORE QUESTIONS. AND, AGAIN, I DON'T WANT YOU TO FEEL LIKE  
13 YOU'RE BEING ATTACKED, BUT I WANT TO MAKE SURE THAT I  
14 UNDERSTAND ALL YOUR ARGUMENTS --

15 MR. LEA: CERTAINLY.

16 THE COURT: -- BECAUSE THIS IS CERTAINLY COMPLICATED.  
17 SO YOU'RE HERE WITH THE ASSUMPTION THAT THE ONLY REAL TOPICS OF  
18 CONVERSATION ARE THE TWO PHONE CALLS. NOW, AGAIN, I'M NOT SURE  
19 THAT THAT IS ACCURATE BECAUSE THERE IS CERTAINLY THE ARGUMENT  
20 THAT THESE CATEGORIES ARE MUCH BROADER THAN THAT. BUT LET'S  
21 SAY, FOR EXAMPLE, THAT THE SUBPOENA IS NOT AS NARROW AS YOU  
22 THINK AND THERE ARE OTHER TOPICS THAT MIGHT BE CALLED UPON TO  
23 BE ADDRESSED SUCH AS JUST, FOR EXAMPLE, THERE'S A LOT IN THE  
24 RECORD ABOUT PRESS INTERVIEWS AND THINGS THAT WERE SAID TO THE  
25 MEDIA. WHY WOULD QUESTIONS ABOUT WHAT WAS THE BASIS OF YOUR

1 STATEMENT IN THE PRESS, WHY DID YOU SAY THAT, LIKE, WHY IS THAT  
2 LEGISLATIVE?

3 MR. LEA: DIRECT ANSWER IS THAT PRESS STATEMENTS, WE  
4 HAVE TO SAY UNDER HELSTOSKI, ARE NOT. WE KNOW THAT BECAUSE  
5 THEY'RE KIND OF OUTSIDE PUBLIC STATEMENTS, AND THE COURT HAS  
6 SAID THAT. THAT SAID, THERE CAN BE NO WAIVER OF SPEECH OR  
7 DEBATE CLAUSE AND YOU CAN'T USE THEM TO THEN BACKDOOR INTO  
8 TALKING ABOUT THE LEGISLATIVE ACTIVITY. AND SO THAT'S WHAT  
9 THEY WOULD BE TRYING TO DO HERE. THEY DON'T HAVE AN  
10 INDEPENDENT INTEREST IN SOME SORT OF PRESS STATEMENT. THEY'RE  
11 TRYING TO USE IT TO PIERCE THE LEGISLATIVE ACTIVITY, AND THAT  
12 VIOLATES THE HARD CORE ABSOLUTE IMMUNITY THAT THE CONSTITUTION  
13 GUARANTEES. SECOND, TO THE OTHER STATEMENTS YOU'VE REFERENCED,  
14 THEY HAVE TIED EVERYTHING TO THE PHONE CALLS.

15 THE COURT: WHERE HAVE THEY DONE THAT? BECAUSE I  
16 DON'T SEE THAT THEY HAVE ONLY TIED IT TO THE PHONE CALLS. I  
17 SEE, WHEN I'M LOOKING AT THE SCOPE, I SEE WHAT IS IN THE  
18 CERTIFICATE OF MATERIAL WITNESS. AND I DON'T SEE THAT BEING  
19 TIED JUST TO THE PHONE CALLS.

20 MR. LEA: I WANT TO GET THE WORDING RIGHT, BUT IT'S  
21 ALL THEMATICALLY TIED TO THE PHONE CALLS, UNIQUE KNOWLEDGE  
22 CONCERNING THE SUBSTANCE, CIRCUMSTANCES SURROUNDING THE  
23 DECISION TO MAKE -- WELL, THAT'S LEGISLATIVE MOTIVE --  
24 LOGISTICS OF SETTING THEM UP. THEY CITE ONE UNPUBLISHED  
25 DISTRICT COURT CASE THAT SAYS THAT'S OFF THE RECORD, BUT THERE

1 ARE OTHER CASES --

2 THE COURT: BUT THE TRUMP CAMPAIGN IS A MUCH BIGGER  
3 BUCKET OF INFORMATION. SO IT APPEARS THAT THEY'RE GOING TO BE  
4 ASKING ABOUT DIRECT COMMUNICATIONS BETWEEN SENATOR GRAHAM AND  
5 THE TRUMP CAMPAIGN APPARENTLY ABOUT EFFORTS TO DISRUPT THE  
6 LAWFUL ADMINISTRATION OF 2020 ELECTIONS IN GEORGIA. SO ADDRESS  
7 THAT BUCKET.

8 MR. LEA: THEY HAVE TIED THAT IN THE SAME LIST THAT'S  
9 TALKING ABOUT THE PLANNING AND EXECUTION OF THE PHONE CALLS.  
10 WE -- AND THEY DIDN'T MENTION THIS AT ALL IN THEIR BRIEFS. WE  
11 SHOULDN'T BE PLAYING WHACK-A-MOLE WITH THE DISTRICT ATTORNEY.  
12 I WOULD, AGAIN, DOVETAILING BACK TO YOUR HONOR'S POINT ABOUT  
13 THE BURDEN, THEY'VE NOT EVEN COME FORWARD WITH ANYTHING  
14 SUGGESTING THAT THIS -- WHAT THIS WOULD HAVE CONSISTED OF OR  
15 WHAT THEY HAVE. AND SURELY, SURELY A CONSTITUTIONAL IMMUNITY  
16 CAN'T BE PIERCED WITH A SIMPLE ASSERTION IN A CERTIFICATE OR A  
17 PETITION. IT WOULD BE MEANINGLESS IF YOU COULD ALWAYS JUST  
18 THROW IN SOME BROAD FISHING EXPEDITION SUBJECT AND THEN SAY NOW  
19 THE IMMUNITY DOESN'T APPLY BECAUSE WE'RE ASKING ABOUT A  
20 NON-LEGISLATIVE THING.

21 THE COURT: WELL, AND I THINK THAT THAT IS NOT  
22 NECESSARILY WHAT'S HAPPENING HERE BECAUSE WE HAVE A SUPERIOR  
23 COURT JUDGE THAT HAS SAID THAT SENATOR GRAHAM HAS KNOWLEDGE OR  
24 AT LEAST SHOULD BE CALLED IN TO ADDRESS CERTAIN TOPICS. SO IF  
25 THERE ISN'T A SPEECH OR DEBATE CLAUSE IMMUNITY TO TALKING ABOUT

1 CONVERSATIONS WITH THE TRUMP ADMINISTRATION CONCERNING ATTEMPTS  
2 TO DISRUPT THE LAWFUL ADMINISTRATION OF '22 ELECTIONS IN  
3 GEORGIA, IF THERE IS NOT ONE OF THESE IMMUNITIES, WHY IS IT MY  
4 ROLE TO SAY THAT WHAT THE SUPERIOR COURT JUDGE HAS DETERMINED  
5 AS KIND OF THE SCOPE, IF IT'S NOT ONE OF THESE THINGS, I MEAN,  
6 WHY SHOULD I JUST SAY THAT'S JUST NOT SOMETHING THAT THEY GET  
7 TO DO?

8 MR. LEA: THE FIRST ANSWER I UNDERSTAND THAT YOU'VE  
9 EXPRESSED SOME SKEPTICISM ABOUT, THAT IT'S TIED TO THE PHONE  
10 CALLS. THE SECOND ANSWER IS THAT YOU CAN'T JUST APPEND  
11 SOMETHING ON AND CUT THROUGH THE IMMUNITY ITSELF AND MAKE HIM  
12 GO SIT FOR QUESTIONING. AND THE THIRD ANSWER IS --

13 THE COURT: WELL, AND BACK TO THAT, WHY WOULD THIS BE  
14 LEGISLATIVE? WHY WOULD COMMUNICATIONS WITH THE TRUMP  
15 ADMINISTRATION ABOUT ATTEMPTS TO DISRUPT THE LAWFUL -- EXCUSE  
16 ME -- TRUMP CAMPAIGN, WHY WOULD THAT BE LEGISLATIVE?

17 MR. LEA: IF YOU JUST SAID THAT IN THE ABSTRACT WITH  
18 NO FACTS, IT DOESN'T SOUND LEGISLATIVE, BUT YOU WOULD NEED --  
19 THEY HAVE COME FORWARD WITH NOTHING TO SUGGEST THAT IT'S  
20 INDEPENDENT OF ANYTHING BUT THE PHONE CALLS. AND THEY HAVEN'T  
21 EVEN COME FORWARD WITH ANY FACTS SUGGESTING IT HAPPENED AT ALL.  
22 AND SO TO MAKE A SENATOR SIT FOR A FISHING EXPEDITION WOULD BE  
23 IMPROPER AND INCONSISTENT WITH THE IMMUNITY. I'D ADD THAT THAT  
24 CERTIFICATE WAS EX PARTE AND DONE WITHOUT ANY SORT OF KNOWLEDGE  
25 OR LITIGATION. AND SO CERTAINLY THE COURT SHOULDN'T RELY ON

1 THAT TO DETERMINE THE SCOPE OF A MOTION TO QUASH. BUT AT THE  
2 END OF THE DAY THEY'VE TIED IT ALL TO THE PHONE CALLS BASED ON  
3 THE WORDING AND THE WAY THEY'VE LISTED THE TOPICS HERE AND  
4 DIDN'T BREAK IT OUT SEPARATELY BEYOND A NON-CITED ALLEGATION IN  
5 THEIR OPPOSITION. AND SO THAT IS A NEW POSITION THEY'RE USING  
6 TO TRY TO SHORE UP A SUBPOENA THAT IS SERIOUSLY FLAWED UNDER  
7 THE IMMUNITIES WE'VE CITED. TO TAKE THE REST OF THEM, AGAIN,  
8 FOR INSTANCE, ANTICIPATED TESTIMONY TO REVIEW ADDITIONAL  
9 SOURCES, THE IMMUNITY WOULD BE MEANINGLESS IF YOU COULD JUST  
10 CALL SOMEBODY IN, A SENATOR, TO SAY, WELL, WE WANT TO ASK HIM  
11 ABOUT OTHER SOURCES OF INFORMATION. BUT TO THE EXTENT THE  
12 COURT HAS CONCERNS, THEY'RE ANSWERED BY THE BURDEN QUESTION I  
13 STARTED WITH, WHICH IS THAT THEY'VE SHOWN NOTHING, OTHER THAN  
14 KIND OF UNCITED ALLEGATIONS, TO SUPPORT THE FACT THAT ANY OF  
15 THIS EXISTS AND THAT IT'S INDEPENDENT OF THE IMMUNITIES, WHICH  
16 DOES BRING ME TO THE SECOND IMMUNITY WHICH EXISTS INDEPENDENT  
17 OF ALL THIS, AND THAT'S SOVEREIGN IMMUNITY.

18 THE COURT'S FAMILIAR WITH THE IDEA. YOU KNOW, IT OFFENDS  
19 A SOVEREIGN TO HAUL IT OR ITS AGENTS BEFORE ANOTHER SOVEREIGN'S  
20 COURTS. WE HAVE CITED TONS AND TONS OF CASES APPLYING THIS IN  
21 THE CONTEXT OF STATE COURT SUBPOENAS. THEY HAVE COME FORWARD  
22 WITH REALLY ONLY TWO RESPONSES, SAY IT DOESN'T APPLY TO A  
23 CRIMINAL LAW CASE. WELL, AGAIN, WE'RE NOT IN A CRIMINAL LAW  
24 CASE. WE'RE TALKING ABOUT A CIVIL GRAND JURY THAT THEY CHOSE  
25 TO USE, THAT'S KENERLY. AND WE KNOW THAT'S WRONG BECAUSE IN



1 THE SPARKS CASE WE CITED, IN THE CROMER CASE WE CITED, COURTS  
2 WERE APPLYING THIS WHERE FEDERAL OFFICIALS WERE SUBPOENAED IN  
3 CONNECTION WITH STATE COURT PROSECUTION. AND THEN THERE'S A  
4 MATTER OF FIRST PRINCIPLES. SOVEREIGN IMMUNITY IS ALL ABOUT  
5 THE COMPULSION. IT'S IRRELEVANT WHAT SORT OF PROCEEDING WE'RE  
6 TALKING ABOUT. AND SO IF THEIR ONLY ARGUMENT OR THEIR PRIMARY  
7 ARGUMENT FOR CUTTING THROUGH THE DOCTRINE IS THAT THERE'S A  
8 CRIMINAL EXCEPTION, WELL, THEN THAT FAILS AND SOVEREIGN  
9 IMMUNITY LIKEWISE INVOLVES A BLANKET QUASH WITHOUT ANY  
10 REFERENCE TO THE SUBJECT BECAUSE IT'S ABOUT OFFENDING THE  
11 SOVEREIGN WITH THE QUESTIONING AT ALL.

12 I WOULD ALSO ADD THAT THE DISTRICT ATTORNEY SAID IT  
13 DOESN'T APPLY TO THE LEGISLATURE AS WRONG. WE'VE CITED THE  
14 CASE SHOWING THE SOVEREIGN IMMUNITY APPLIES TO THE LEGISLATURE.  
15 IT'S ALSO ILLOGICAL. THE LEGISLATURE IS PART OF THE SOVEREIGN  
16 AS WELL. THERE'S NO REASON IT WOULD APPLY TO EXECUTIVE BRANCH  
17 OFFICIALS AND NOT THE LEGISLATIVE BRANCH. SO THAT'S AN  
18 INDEPENDENT BASIS FOR COMPLETE QUASHAL. I'M HAPPY TO ANSWER  
19 ANY QUESTIONS ABOUT THAT. IF NOT, I'LL DISCUSS THE  
20 HIGH-RANKING OFFICIAL DOCTRINE.

21 THE COURT: YOU CAN MOVE TO THE HIGH-RANKING OFFICIAL  
22 DOCTRINE.

23 MR. LEA: IT'S EXACTLY WHAT IT SOUNDS LIKE. I KNOW  
24 THE COURT'S FAMILIAR FROM THE HICE PROCEEDING BECAUSE YOU'VE  
25 DISCUSSED IT. BUT THE GIST IS THAT YOU CANNOT COMPEL THE

1 TESTIMONY OF A HIGH-RANKING OFFICIAL UNLESS YOU HAVE  
2 EXTRAORDINARY CIRCUMSTANCES AS DEFINED BY THE CASE LAW. AND  
3 THAT LAST PART IS IMPORTANT FOR A REASON I'LL GET TO IN A  
4 MINUTE. FIRST OF ALL, AGAIN, WE HAVE ANOTHER ARGUMENT. THEIR  
5 LEAD ARGUMENT IN EVERY SITUATION IS THAT IT DOESN'T APPLY TO  
6 CRIMINAL CASES. (A), AGAIN, NOT A CRIMINAL CASE. WE HAVE  
7 BINDING PRECEDENT SAYING THAT. TWO, PRECEDENT IN THE ELEVENTH  
8 CIRCUIT, KESSLER, SAYS IT DOES IN FACT APPLY TO CRIMINAL CASES.  
9 AND THEN A THIRD IS A MATTER OF FIRST PRINCIPLES. THE ELEVENTH  
10 CIRCUIT HAS TOLD US IT'S ABOUT SEPARATION OF POWERS, WHICH  
11 APPLY OF COURSE IN CRIMINAL CASES, AND OF COURSE A CRIMINAL  
12 CASE CAN BURDEN A HIGH-RANKING OFFICIAL.

13 THE COURT: THE WAY I LOOK AT THE HIGH-RANKING  
14 OFFICIAL DOCTRINE, AND I WANTED YOU TO ADDRESS THIS, IS THAT,  
15 FOR EXAMPLE, IF THEY WANTED TO DEPOSE SENATOR GRAHAM ABOUT HOW  
16 THE MAILROOM WORKED. WELL, THERE'S OBVIOUSLY PEOPLE LOWER DOWN  
17 THAT COULD TALK ABOUT THAT. HE DOESN'T NEED TO BE BOTHERED.  
18 IT'S KIND OF SET UP FOR THOSE KIND OF SCENARIOS.

19 NOW, WHERE YOU HAVE SOMEONE WITH FIRST-HAND KNOWLEDGE  
20 ABOUT SOMETHING DISPUTED AND THEY'RE THE PERSON -- THERE'S ONLY  
21 A FEW PEOPLE ON THIS PHONE CALL AND PEOPLE HAVE VERY  
22 DIFFERENT -- ON THESE TWO PHONE CALLS AND THEY HAVE, ACCORDING  
23 TO YOU HERE TODAY, HAVE VERY DIFFERENT RECOLLECTIONS OF WHAT IS  
24 ACTUALLY SAID. AND I HAVE A HARD TIME BELIEVING THAT NO ONE  
25 THINKS THAT THIS ISN'T IMPORTANT. SO WHEN WE LOOK AT THESE

1 DIFFERENT FACTORS, THIS DOESN'T, TO ME, FIT NEATLY INTO THE  
2 CIRCUMSTANCES IN WHICH THIS HAS BEEN USED IN THE PAST. IN THE  
3 PAST YOU'VE HAD SOMEONE WITH VERY, VERY CURSORY KNOWLEDGE OF  
4 SOMETHING. YOU HAVE OTHER PEOPLE IN THEIR OFFICE THAT KNOW THE  
5 ANSWERS TO THE QUESTIONS. AND SO A STAFF OR A LOWER LEVEL  
6 EXECUTIVE HAS BEEN THE ONE THAT HAS HAD TO ANSWER THE  
7 QUESTIONS. BUT THIS FACTUAL SCENARIO SEEMS VERY DIFFERENT THAN  
8 THAT. SO WHY DOES THIS FIT WITHIN THOSE FACTORS?

9 MR. LEA: FIRST, TO GIVE YOU THE PRECEDENT,  
10 RECOGNIZING THAT IT DOES APPLY WHERE THE OFFICIAL HAD FIRSTHAND  
11 KNOWLEDGE, MCNAMEE OUT OF THE DISTRICT OF MASSACHUSETTS WHICH  
12 IS CITED IN THE BRIEFS, AND MORIAH OUT OF THE SOUTHERN DISTRICT  
13 OF NEW YORK WHICH IS CITED IN THE BRIEFS, TO THE MORE  
14 FUNDAMENTAL POINT FOR THE COURT. AGAIN, THE ELEVENTH CIRCUIT  
15 IN RE: U.S.A. HAS TOLD US THAT IT'S ABOUT SEPARATION OF POWERS.  
16 AND SO, THEREFORE, YOU RESPECT THE OFFICER UNLESS YOU CAN  
17 SATISFY THE TWO TESTS AS HAS BEEN DEFINED. AND THERE'S NO  
18 EXCEPTION TO THAT FOR THIS PERSON HAD FIRSTHAND KNOWLEDGE. IN  
19 FACT IT WOULD DEFEAT THE DOCTRINE IF YOU COULD SAY, WELL, THERE  
20 WERE DIFFERING PERSPECTIVES BECAUSE THAT COULD BE TRUE IN ANY  
21 SITUATION. TWO PEOPLE CAN READ A DOCUMENT DIFFERENT. THEY CAN  
22 FEEL THE DIFFERENT WAY ABOUT A PHONE CALL. THAT'S ALWAYS THE  
23 POSSIBLE (VERBATIM) THAT SOMEBODY'S PERSPECTIVE WILL DIFFER.  
24 AND THE COURTS HAVE NEVER SUGGESTED THAT THAT'S HOW THE  
25 DOCTRINE TURNS.

1           NOW, TO -- YOUR HONOR RAISED NATURALLY THE FOLLOW-ON POINT  
2 ABOUT ASSUMING IT APPLIES, HOW DOES IT APPLY. AND THE COURT'S  
3 CLEARLY FAMILIAR WITH THE TWO-PART TEST. FIRST, AND THEY HAVE  
4 THE BURDEN AS THE PARTY SEEKING TO COMPEL, AND THAT'S IN  
5 KESSLER, YOU HAVE TO SHOW THAT WHAT YOU'RE SEEKING IS ESSENTIAL  
6 TO YOUR CASE. THERE HAS BEEN NO EXPLANATION OF THAT HERE AT  
7 ALL. THERE'S A BROAD REFERENCE TO WHAT THEIR INVESTIGATION IS  
8 DOING. THERE'S A REFERENCE FOR THIS PHONE CALL. THERE'S NO  
9 INDICATION ABOUT HOW THEY THINK IT FITS IN.

10           AND THEN, SECOND, YOU HAVE TO SHOW THAT YOU CAN'T GET THE  
11 INFORMATION ANYWHERE ELSE. AND HERE WE KNOW FOR A FACT THAT  
12 THERE WERE OTHER PEOPLE ON THE PHONE CALLS. AND NOT ONLY THAT,  
13 THEY'VE COME FORWARD WITH NO INDICATION ABOUT WHAT OTHER  
14 INVESTIGATION THEY'VE DONE. AND SO IT BOILS ALL DOWN TO YOUR  
15 HONOR'S POINT ABOUT, WELL, DIFFERING PERSPECTIVES SOMEHOW  
16 DEFEAT THE DOCTRINE. AND THE ANSWER IS, NO, THE CASE LAW HAS  
17 NEVER SUGGESTED THAT AND THAT WOULD RENDER THE DOCTRINE  
18 SELF-DEFEATING. AND SO FOR THAT REASON AS WELL THEY CERTAINLY  
19 HAVEN'T CARRIED THEIR DOCTRINE -- THEY'RE BURDEN UNDER THE  
20 HIGH-RANKING OFFICIAL DOCTRINE AND CERTAINLY NOT AS A DEVELOPED  
21 SUBPOENA.

22           THE COURT: SO UNDER THIS ARGUMENT A SENATOR COULD  
23 NEVER BE REQUIRED TO ANSWER QUESTIONS ABOUT PHONE CALLS THAT  
24 HAD PEOPLE ON THE CALL THAT WEREN'T SENATORS OR --

25           MR. LEA: IT WOULD TAKE A VERY, VERY SPECIFIC CASE IF

1 IT'S POSSIBLE AT ALL, BUT THAT'S EXACTLY HOW THE DOCTRINE'S  
2 DESIGNED TO OPERATE. AND THEY CERTAINLY HAVE COME FORWARD WITH  
3 NOTHING TO SHOW THAT THIS IS THAT EXTRAORDINARY CASE WHEN  
4 THEY'VE ALREADY INTERVIEWED TWO OTHER PEOPLE, PRESUMABLY HAVE  
5 ACCESS TO MORE. THEY SORT OF VAGUELY REFERENCE OTHER  
6 INVESTIGATIONS THEY'VE CONDUCTED. AND IF THERE'S SOMETHING  
7 MORE THAT THEY NEED, IT'S INCUMBENT UPON THEM TO EXPLAIN WHY  
8 AND EXPLAIN WHY SENATOR GRAHAM IS RELEVANT. BUT TO JUST SAY  
9 BLANKETLY THAT, WELL, HIS PERSPECTIVE MIGHT DIFFER, WOULD MAKE,  
10 AGAIN, THE DOCTRINE NOT WORTH ITS SALT, FRANKLY.

11 THE COURT: OKAY. WELL, AND I GUESS WE HAVE THAT  
12 ARGUMENT AND THE OTHER ARGUMENT THAT SENATORS DON'T HAVE TO  
13 ANSWER QUESTIONS WHERE OTHER PEOPLE MAY HAVE INFORMATION  
14 PERIOD.

15 MR. LEA: RIGHT. I CONSIDER THOSE -- I MEAN, IF THE  
16 OTHER PEOPLE HAVE THE INFORMATION, THEY NEED TO COME AND SHOW  
17 WHAT'S MISSING FROM THE INFORMATION. AND THEY JUST HAVEN'T  
18 DONE THAT. SO TO YOUR QUESTION, WOULD IT INEVITABLY BE MET?  
19 YES, IT'S DESIGNED TO BE ROBUST. IT'S USUALLY MET. BUT MY  
20 POINT WAS THAT IF THERE'S A CASE TO BE MADE FOR WHY IT'S NOT  
21 MET HERE, TO SAY THAT THERE'S JUST A CRIMINAL EXCEPTION AND  
22 THEN NOT EXPLAIN YOURSELF FURTHER DOESN'T CARRY THE BURDEN.  
23 AND SO IF YOUR HONOR HAS CONCERNS THAT IT MIGHT BE TOO  
24 ABSOLUTE, I'M SAYING IT WOULD BE ON THEM TO SHOW AN EXCEPTION  
25 BY SHOWING WHAT THEY'VE INVESTIGATED AND WHY SPECIFICALLY THEY

1 NEED SENATOR GRAHAM'S TAKE ON IT.

2 THE COURT: NOW, ANOTHER QUESTION THAT'S KIND OF  
3 DIFFERENT IS THAT THERE WAS THE AMICUS BRIEF FILED IN THE CASE.  
4 AND I GAVE YOU AN OPPORTUNITY TO FILE A RESPONSE TO IT. IN  
5 TERMS OF TIMING FOR ALL THIS, I JUST DON'T WANT TO WAIT FOR  
6 SOMETHING THAT'S NOT COMING. I DIDN'T KNOW IF YOU WERE GOING  
7 TO FILE A RESPONSE OR NOT. IT DOES HAVE SOME ARGUMENTS WE'VE  
8 BEEN TALKING ABOUT TODAY, BUT DID YOU WANT TO HAVE THE TIME TO  
9 FILE THE RESPONSE TO THAT, OR WHAT WAS YOUR FEELING ON THAT?

10 MR. LEA: OUR CURRENT PLAN IS TO DO SO UNLESS THE  
11 COURT TELLS US IT'S NOT HELPFUL FOR SOME REASON. BUT CERTAINLY  
12 WE THINK THOSE ARGUMENTS ARE WRONG AND UNHELPFUL HERE, AND  
13 WOULD LIKE THE CHANCE TO EXPLAIN WHY.

14 THE COURT: THAT'S TOTALLY FINE. I JUST DIDN'T WANT  
15 TO WAIT FOR SOMETHING THAT WASN'T HAPPENING.

16 MR. LEA: UNDERSTOOD.

17 THE COURT: BUT I DIDN'T WANT TO ISSUE AN ORDER IF  
18 YOU WERE GOING TO RESPOND. SO I THINK IT WOULD BE HELPFUL. I  
19 THINK SOME OF THOSE ARGUMENTS WERE PROBABLY MADE IN A BETTER  
20 WAY THAN SOME OF THE D.A.'S ARGUMENTS. AND THEY DO REFERENCE  
21 SOME OF THE ISSUES AND THE QUESTIONS I'VE ASKED TODAY, SO I  
22 THINK IT WOULD BE HELPFUL FOR YOU TO RESPOND TO THAT.

23 MR. LEA: ABSOLUTELY. WE'RE HERE TO HELP. THANK  
24 YOU.

25 THE COURT: OKAY.

1 MR. LEA: IF THERE ARE NO MORE QUESTIONS, I WILL  
2 YIELD THE PODIUM --

3 THE COURT: I THINK I ASKED YOU ENOUGH QUESTIONS,  
4 DIDN'T I?

5 MR. LEA: THANK YOU, YOUR HONOR.

6 THE COURT: DON'T WANT ANYMORE, I DON'T THINK. AND I  
7 APPRECIATE YOU ANSWERING THEM. I KNOW IT'S KIND OF ROUGH AND I  
8 DON'T WANT YOU TO FEEL LIKE I WAS ATTACKING YOU, BUT THAT'S HOW  
9 I PROCESS INFORMATION. AND I APOLOGIZE THAT YOU'RE THE ONE  
10 THAT HAD TO BE THE BRUNT OF THAT, SO --

11 MR. LEA: WE'RE ALWAYS HAPPY TO HELP THE COURT.  
12 THANK YOU.

13 THE COURT: THANK YOU.

14 OKAY. LET ME HEAR FROM SOMEONE FROM THE D.A.'S OFFICE.

15 MR. WAKEFORD: YES, YOUR HONOR.

16 THE COURT: AND I THINK AS A GOOD STARTING POINT,  
17 THERE WAS A LOT OF DISCUSSION ABOUT WHAT IT IS THAT YOU WANT TO  
18 ASK ABOUT AND HOW BROAD THIS IS. AND I DON'T KNOW REALLY THE  
19 ANSWER TO THAT QUESTION. WE'VE GOT THE TWO PHONE CALLS AND I  
20 KNOW THAT YOU WANT TO ASK ABOUT THOSE. CERTAINLY THERE'S THESE  
21 OTHER CATEGORIES AND THE CERTIFICATE OF MATERIAL WITNESS, BUT I  
22 DON'T KNOW IF THOSE ARE JUST TIED TO THE PHONE CALLS OR THEY'RE  
23 BROADER. I THINK IT WOULD BE HELPFUL TO AT LEAST GIVE SOME  
24 GUIDANCE ON THAT. AND I'M ALSO -- THERE'S A LOT OF FACTS  
25 MISSING FROM THE RECORD. THE SENATOR GRAHAM SIDE SAYS IT'S THE

1 D.A.'S. OFFICE, IT'S THEIR REQUIREMENT TO PROVIDE THOSE SO THAT  
2 I CAN ANSWER THESE QUESTIONS. I ASSUME YOU'RE GOING TO SAY  
3 IT'S THEIR OBLIGATION TO PROVIDE THOSE. SO MAKE SURE YOU TALK  
4 ABOUT THAT, BUT I'M VERY CURIOUS AS TO HOW BROAD THIS IS, IS IT  
5 JUST THE TWO PHONE CALLS, IS IT A BUNCH OF OTHER THINGS. WHAT  
6 ARE WE TALKING ABOUT HERE?

7 MR. WAKEFORD: YES, YOUR HONOR. SO OBVIOUSLY WE ARE  
8 TALKING ABOUT THE PHONE CALLS. AND I THINK THERE'S AN OBVIOUS  
9 REASON FOR THAT, WHICH IS THE PHONE CALLS WERE THE FACTS  
10 PRESENTED IN THE PETITION FOR A CERTIFICATE, AND THEN IN THE  
11 CERTIFICATE THAT WAS ISSUED BY THE FULTON COUNTY SUPERIOR COURT  
12 TO INITIATE THIS ENTIRE PROCESS. THAT CERTIFICATE -- THAT  
13 PROCESS REQUIRES US TO SHOW THAT WE HAVE A WITNESS WHO IS  
14 NECESSARY AND MATERIAL TO THE INVESTIGATION. THE MOST OBVIOUS  
15 AND SUCCINCT WAY TO MAKE THAT CASE TO THE COURT WAS TO SAY  
16 THERE ARE THESE PHONE CALLS TO AN OFFICIAL WHO IS IN THE MIDDLE  
17 OF THE EVENTS THAT ARE WITHIN THE INVESTIGATION THIS SPECIAL  
18 PURPOSE GRAND JURY IS PURSUING. THIS PERSON MADE THESE CALLS  
19 AND THERE ARE PUBLIC STATEMENTS FROM THE PARTICIPANTS ON THE  
20 CALL THAT THIS WAS THE INTENT THEY UNDERSTOOD FROM HIM. THAT  
21 WAS THE EASIEST MOST SUCCINCT WAY TO MAKE A CASE FOR  
22 MATERIALITY AND NECESSITY. SO WHAT I DON'T WANT THE COURT TO  
23 UNDERSTAND -- AND THAT IS NOT THE ENTIRE UNIVERSE OF FACTS THAT  
24 THE SENATOR COULD BE SUBJECTED TO QUESTIONING ABOUT. THE ORDER  
25 IMPANELING THE SPECIAL PURPOSE GRAND JURY SAYS ANY FACTS AND



1 CIRCUMSTANCES DIRECTLY OR INDIRECTLY RELATED TO THE SUBJECT OF  
2 THIS INVESTIGATION. AND THAT TRACKS THE LANGUAGE OF THE  
3 STATUTE. SO WHILE THE PHONE CALLS ARE OF COURSE A VERY  
4 PUBLICLY-KNOWN EVENT, THAT IS A VERY OBVIOUSLY PERTINENT MATTER  
5 THAT WE -- THAT THE SENATOR WOULD HAVE TO BE QUESTIONED ABOUT  
6 BECAUSE IT'S MATERIAL AND NECESSARY TO THIS INVESTIGATION.  
7 THERE ARE ALSO PUBLIC STATEMENTS BY THE SENATOR. THE SENATOR  
8 IS A NATIONALLY-RECOGNIZED LEGISLATOR. HE APPEARS ON  
9 TELEVISION. HE APPEARS ON -- HE APPEARS IN PRINT. HE APPEARS  
10 ON THE INTERNET GIVING STATEMENTS ABOUT MATTERS VERY PUBLICLY.  
11 SO STATEMENTS THAT THE SENATOR MAKES PUBLICLY WOULD NOT BE  
12 COVERED BY ANY SORT OF LEGISLATIVE PROTECTION, BUT WOULD STILL  
13 BE RELEVANT TO THE SPECIAL PURPOSE GRAND JURY'S INQUIRIES. AND  
14 THEN OF COURSE THERE ARE THE ANCILLARY MATTERS -- THE OTHER  
15 MATTERS THAT ARE ALLUDED TO WITHIN THE CERTIFICATION THAT STATE  
16 THAT ANY CONVERSATIONS THAT THE SENATOR HAD CONCERNING THE  
17 EVENTS RELEVANT TO THE SPECIAL PURPOSE GRAND JURY WITH THE  
18 TRUMP CAMPAIGN, WITH OTHER OUTSIDE PARTIES, WITH -- AND  
19 POSSIBLE COORDINATION WITH THOSE PARTIES IS SUBJECT TO  
20 QUESTIONING. SO I -- THE CERTIFICATE PROVIDES US WITH A POINT,  
21 AN EVENT THAT IS VERY WELL UNDERSTOOD AND VERY PUBLIC THAT IS  
22 OBVIOUSLY MATERIAL, BUT IT IS NOT THE ONLY THING THAT WE INTEND  
23 TO QUESTION THE -- THAT THE SPECIAL PURPOSE GRAND JURY COULD  
24 QUESTION THE SENATOR ABOUT.

25 WITH REGARD TO THE FACTS, I APOLOGIZE IF THERE ARE -- IF

1 THERE IS ADDITIONAL FACTS, ADDITIONAL BRIEFING THAT IS  
2 REQUIRED, WE HAD ABOUT 72 HOURS TO FILE OUR RESPONSE IN THIS  
3 CASE. AND SO TO THE EXTENT THAT THERE ARE DEFICIENCIES,  
4 FACTUALLY THAT FALLS ON ME. I AM HAPPY TO PROVIDE ANY  
5 ADDITIONAL BRIEFING THAT THIS COURT ASKS FOR OR REQUIRES,  
6 PARTICULARLY IF THE -- IF THE SENATOR IS GOING TO BE PROVIDING  
7 ADDITIONAL BRIEFING, THAT'S SOMETHING THAT WE STAND READY TO  
8 DO.

9 THE COURT: WELL, I GUESS IN LOOKING AT THESE ISSUES,  
10 ONE PATH OF ANALYZING THIS IS THAT TO THE EXTENT THAT SENATOR  
11 GRAHAM WAS GATHERING INFORMATION AND QUESTIONING PEOPLE TO GET  
12 FACTUAL INFORMATION, THAT'S THE STRONGEST ARGUMENT THEY HAVE  
13 THAT THE QUESTIONS BEING ASKED WOULD BE PROTECTED BY THE SPEECH  
14 OR DEBATE CLAUSE. SO IF THE QUESTION WAS, WHEN YOU HAD THESE  
15 TWO CALLS, WHAT DID PEOPLE TELL YOU ABOUT WHETHER THERE WERE  
16 PROBLEMS IN GEORGIA, AND THINGS LIKE THAT. THAT'S THE  
17 STRONGEST ARGUMENT THEY HAVE.

18 NOW, IT'S IMPORTANT TO UNDERSTAND WHAT BEYOND THAT MAY BE  
19 HAPPENING AT THE GRAND JURY BECAUSE THERE ARE TWO WAYS OF DOING  
20 THIS. ONE, IS A TOTAL QUASHAL BECAUSE EVERYTHING IS  
21 ENCOMPASSING THIS LEGISLATIVE FACT-GATHERING, WHICH, AGAIN, I'M  
22 NOT SAYING IS PROTECTED, BUT IT'S THE STRONGEST THING. THE  
23 OTHER IS WHAT ELSE IS GOING ON. IF IT'S REASONS FOR PUBLIC  
24 STATEMENTS, IF IT'S MORE OF THESE TELLING PEOPLE TO DO  
25 THINGS -- BUT I DON'T KNOW WHAT IT IS THAT YOU KNOW ABOUT THAT

1 OR WANT TO ASK ABOUT THAT. SO I'M LEFT WITH KIND OF THIS  
2 AMORPHOUS IDEA THAT THERE MAY BE ADDITIONAL SUBJECTS OR  
3 KNOWLEDGE THAT YOU HAVE. AND IT'S DIFFICULT TO KNOW KIND OF  
4 CONCRETELY WHAT BEYOND JUST CALLING THE SECRETARY TWICE AND  
5 SAYING, WHAT'S GOING ON IN GEORGIA, WHAT'S HAPPENING HERE. AND  
6 IT'S A LITTLE DICEY BECAUSE IT IS A GRAND JURY, BUT HOW CAN YOU  
7 ADDRESS THAT ISSUE? BECAUSE THAT'S THE PROBLEM THAT WE HAVE  
8 WITH THIS RECORD.

9 MR. WAKEFORD: THAT'S -- THAT IS EXACTLY THE PROBLEM,  
10 AS YOUR HONOR POINTS OUT, IT IS A GRAND JURY. AND SO THERE HAS  
11 BEEN AN ATTEMPT MADE AT EVERY STAGE, INCLUDING WITH CONGRESSMAN  
12 HICE, TO PROVIDE YOUR HONOR ARGUMENTS THAT DO NOT GO INTO  
13 INFORMATION THAT HAS BEEN GATHERED BY THE SPECIAL PURPOSE GRAND  
14 JURY, BUT INSTEAD TO RELY ON INFORMATION THAT IS ALREADY IN THE  
15 PUBLIC SPHERE. AND IN THIS SCENARIO WHERE THEY ARE ASKING FOR  
16 TOTAL QUASHAL, WE BELIEVE THAT THE INFORMATION THAT IS ALREADY  
17 IN THE PUBLIC SPHERE MAKES CLEAR THAT TOTAL QUASHAL IS NOT  
18 APPROPRIATE, AND, THAT IS, BECAUSE OF THE STATEMENTS OF THE  
19 SENATOR HIMSELF WHICH WE CITE IN OUR BRIEF WHERE HE IS ASKED ON  
20 NOVEMBER 17TH, 2020 BY A REPORTER, DID YOU -- DID YOU ASK THE  
21 SECRETARY OF STATE TO THROW OUT VOTES? AND SENATOR GRAHAM  
22 SAID, "NO. THAT'S RIDICULOUS. I TALKED ABOUT HOW YOU VERIFY  
23 SIGNATURES. RIGHT NOW A SINGLE PERSON VERIFIES SIGNATURES.  
24 AND I SUGGESTED, AS YOU GO FORWARD CAN YOU CHANGE IT TO MAKE  
25 SURE THAT A BIPARTISAN TEAM VERIFIES SIGNATURES, AND IF THERE'S

1 A DISPUTE, COME UP WITH AN APPEAL PROCESS?"

2 THAT IS ASKING THE SECRETARY OF STATE TO CHANGE A PROCESS  
3 THAT IS ALREADY ONGOING TO REFLECT THE SENATOR'S PREFERRED  
4 PROCESS. THAT IS AN EXHORTATION EXACTLY LIKE THE SUPREME COURT  
5 PRECEDENTS TALK ABOUT. THAT RIGHT THERE INDICATES THAT THIS  
6 CONVERSATION BY THE SENATOR'S OWN RECORDS, LEAVE ASIDE WHAT  
7 SECRETARY RAFFENSPERGER OR ANY OTHER PARTICIPANT HAS SAID, THAT  
8 ALONE DEMONSTRATES THAT THIS CONVERSATION WAS NOT ENTIRELY  
9 ABOUT LEGISLATIVE ACTS. IT CAN'T BE. THAT IS IMPORTUNING,  
10 EXHORTING, PERSUADING, WHATEVER WORD THE SUPREME COURT WOULD  
11 LIKE TO USE, THAT'S WHAT THAT IS. WHEN ASKED WHY IN ANOTHER  
12 QUESTION, A SECOND QUESTION, WHICH WE ALSO ALLUDE TO IN OUR  
13 BRIEF, THE SENATOR AGAIN SHIFTS FOCUS ABOUT WHAT THE  
14 CONVERSATION WAS ACTUALLY ABOUT AND ACTUALLY SAYS, MY FOCUS WAS  
15 ACTUALLY THE UPCOMING JANUARY 5TH SENATE RUN-OFF. AND I WANTED  
16 TO KNOW -- AND I'LL FIND THAT QUOTATION IN JUST A MINUTE, YOUR  
17 HONOR, THAT JUST SORT OF TALKED ABOUT DOING BETTER. AND HE  
18 SAID, "I WANT TO TALK ABOUT HOW YOU VERIFY SIGNATURES, AND, AS  
19 WE GO FORWARD, CAN WE DO BETTER?" CLEARLY TALKING ABOUT THE  
20 JANUARY 5TH RUN-OFFS WHICH WERE THE FOCUS.

21 THE COURT: WHY DO WE KNOW THAT? BECAUSE THEY SAY  
22 THAT HAS TO DO WITH THEM TRYING TO PASS NATIONAL LEGISLATION TO  
23 CHANGE ELECTIONS, SO THAT WOULD BE LEGISLATIVE. AND IT KIND OF  
24 GOES BACK TO THIS IDEA IF THERE'S A QUESTION OF FACT AS TO WHAT  
25 THE MEANING OF THE STATEMENT IS, HOW DO I ANALYZE THE BURDENS

1 AS IT RELATES TO INTERPRETING THESE STATEMENTS?

2 MR. WAKEFORD: WELL, LET ME STATE UNEQUIVOCALLY THAT  
3 THE BURDEN IS ON THE SENATOR. THE SENATOR IS ASSERTING -- IS  
4 ASSERTING THE IMMUNITY, THE PRIVILEGE. AND THE CASE LAW SAYS  
5 BY A PREPONDERANCE THE SENATOR HAS TO SHOW THAT THIS WAS A  
6 LEGISLATIVE ACT AS OPPOSED TO A POLITICAL OR PERSONAL ACT. AND  
7 SO WHEN YOU HAVE A SITUATION LIKE THIS WHERE THERE IS A DISPUTE  
8 AND MULTIPLE PARTICIPANTS ON A TELEPHONE CALL, FOR EXAMPLE,  
9 JUST THE MERE FACT THAT EVERYBODY SEEMS TO HAVE AN  
10 UNDERSTANDING OF HOW THE CONVERSATION WENT EXCEPT FOR THE  
11 SENATOR WOULD INDICATE THAT THERE IS A DISPUTE THERE THAT DOES  
12 NOT -- THIS SITUATION IS NOT RIPE FOR THE APPLICATION OF TOTAL  
13 QUASHAL AND LEGISLATIVE IMMUNITY BECAUSE HE CAN'T SHOW BY A  
14 PREPONDERANCE THAT THIS IS THE ONLY THING THAT THIS  
15 CONVERSATION WAS ABOUT.

16 ADDITIONALLY, I FOUND THAT CLARIFICATION, BY THE WAY.  
17 AND, AGAIN, THE SENATOR'S OWN WORDS MAKE CLEAR THAT THIS IS NOT  
18 A LEGISLATIVE ACT. WHEN ASKED AGAIN ABOUT THE POSSIBILITY THAT  
19 HE IMPLIED SOMETHING IMPROPER, HE SAID, "THAT WASN'T MY INTENT  
20 AND THAT WASN'T THE PURPOSE OF THE CONVERSATION, TO THROW OUT  
21 BALLOTS. WE'RE TALKING ABOUT AN ELECTION WE HAVEN'T EVEN HAD  
22 YET, WHICH IS THE SENATE RACES. THAT WAS MY FOCUS, IS HOW YOU  
23 VERIFY SIGNATURES. WE'VE GOT A NEW SENATE RACE COMING UP. IS  
24 THERE ANYTHING WE CAN DO TO MAKE IT BETTER?"

25 WHEN HE'S TALKING ABOUT THE SIGNATURE VERIFICATION

1 PROCESS, THAT'S NOT ABOUT PASSING FUTURE LEGISLATION,  
2 PARTICULARLY WHEN HE'S MAKING OTHER COMMENTS ABOUT --

3 THE COURT: WHY ISN'T IT FUTURE LEGISLATION AS IT  
4 RELATES TO THAT SENATE RACE, THAT MAYBE THEY WERE GOING TO TRY  
5 TO PASS SOMETHING RIGHT THEN SO THAT IT WOULD AFFECT THE SENATE  
6 RACE?

7 MR. WAKEFORD: BECAUSE THERE IS NO INDICATION THAT --  
8 I MEAN, THE ONLY THING THAT SUGGESTS THAT THAT COULD BE ABOUT  
9 FUTURE LEGISLATION IS HIS ARGUMENTS TO THIS COURT NOW. EVERY  
10 OTHER STATEMENT HE MADE WAS ABOUT THE ONGOING, UNFOLDING  
11 ELECTIONS TAKING PLACE. AND ALSO THE STATEMENTS BY THE OTHER  
12 PARTICIPANTS ON THE CALL INDICATE THAT THE SENATOR WAS TRYING  
13 TO GET THEM TO PURSUE DIFFERENT ACTIVITIES THAN THEY WERE  
14 PURSUING. SO IF YOU LEAVE ASIDE EVERYTHING EXCEPT WHAT THE  
15 SENATOR -- HOW THE SENATOR CHARACTERIZES THE CONVERSATION, THEN  
16 THAT COULD BE ABOUT LEGISLATION. WE DON'T KNOW WHAT  
17 LEGISLATION. THERE'S NO INDICATION THERE WAS EVER ANY  
18 LEGISLATION OR THAT THE SENATOR WOULD EVER CONSIDER IT, BUT  
19 IT'S POSSIBLE. BUT WE DON'T HAVE TO LEAVE THAT STUFF ASIDE  
20 BECAUSE IT'S ALL IN THE PUBLIC SPHERE. WE HAVE THE STATEMENTS  
21 BY SECRETARY RAFFENSPERGER AND MR. STERLING AND WE HAVE THE  
22 STATEMENTS BY THE SENATOR HIMSELF THAT THE FUTURE OF THE  
23 COUNTRY HANGS IN THE BALANCE. AND I DON'T -- HE'S NOT TALKING  
24 ABOUT FUTURE LEGISLATION. IT'S A SUGGESTION THAT UTTERLY  
25 REMOVES THESE STATEMENTS FROM CONTEXT TO SAY THAT IT COULD BE

1 ABOUT HE'S GOING TO PASS A BILL. HE MAKES ONE STATEMENT ABOUT  
2 SHOULD THERE BE NATIONAL STANDARDS WHEN ACTUAL NATIONAL VOTING  
3 REGISTRATION -- LEGISLATION WAS PROPOSED IN THE PAST YEAR --  
4 AND THIS IS NOT IN OUR BRIEF AND I APOLOGIZE, BUT I CAN PROVIDE  
5 SOURCES IF YOUR HONOR LIKES -- THE SENATOR REFERRED TO IT  
6 REPEATEDLY AS THE FEDERALIZATION OF ELECTIONS AND THAT THAT'S  
7 THE PROPER PROVINCE OF THE STATES AND THAT HE WOULD NEVER EVER  
8 PUT UP WITH THE FEDERALIZATION OF ELECTION STANDARDS AND THAT'S  
9 COMPLETELY IMPROPER. AGAINST ALL OF THOSE STATEMENTS, IN  
10 ADDITION TO THE CONTEXT THAT THESE STATEMENTS WERE GIVEN IN THE  
11 MOMENT, WE HAVE ONE, I DON'T KNOW, MAYBE THERE SHOULD BE  
12 NATIONAL STANDARDS. AND THEY HANG THEIR ENTIRE ARGUMENT TO  
13 THIS COURT ON THAT. OTHERWISE, IT IS SIMPLY COMING FORWARD NOW  
14 AND SAYING, WELL, IT COULD HAVE BEEN ABOUT LEGISLATION. I  
15 CERTAINLY CARE ABOUT ELECTIONS AND SO THAT'S ENOUGH. AND  
16 THAT'S NOT LEGISLATIVE IMMUNITY OR PRIVILEGE. THAT'S  
17 LEGISLATIVE FIAT TO BE ABLE TO COME TO THIS COURT AND SAY, I  
18 HAD A CONVERSATION -- EVERYBODY ELSE RECALLS IT ONE WAY, BUT I  
19 RECALL IT THIS WAY, THAT'S IT. AND THEN WHAT IS THE PURPOSE OF  
20 THE INQUIRY? BECAUSE AT THAT POINT A SENATOR CAN COME FORWARD  
21 AND SAY, YEAH, THERE'S MULTIPLE INTERPRETATIONS, BUT MINE IS  
22 THIS. AND SO THE COURT'S JOB IS DONE. WE HAVE ALL WE NEED.  
23 AND THAT'S NOT HOW THIS WORKS, ESPECIALLY WHEN IT'S THE SENATOR  
24 WHO HAS THE BURDEN. I ALSO WANT TO ADDRESS ONE OTHER STATEMENT  
25 WHICH WAS MADE BY THE SENATOR'S COUNSEL, WHICH IS THAT YOU --

1 THEY SAY REPEATEDLY, WE GOT TO STRIP -- WE GOT TO STRIP THIS  
2 ACT OF ALL CONTEXT, OF ALL MOTIVATION AND EVERYTHING ELSE AND  
3 JUST LOOK AT WHAT IT IS. THE CASES THAT GAVE US THAT SORT OF  
4 FRAMEWORK WERE CASES THAT SAY, WHAT ACTUALLY IS THE ACT? AND  
5 IT'S VERY OFTEN GIVING A SPEECH ON THE FLOOR AS IN I -- I MIX  
6 THE CASES UP, BUT I BELIEVE IT WAS EITHER BREWSTER OR JOHNSON,  
7 AS MY LEARNED COLLEAGUE POINTED OUT, WHERE THERE WAS A SPEECH  
8 THAT WAS GIVEN AND A PROSECUTION WHICH TRIED TO SAY THIS SPEECH  
9 WAS GIVEN FOR AN IMPROPER PURPOSE. AND THEY SAID, WELL, WAIT A  
10 MINUTE. JUST LOOK AT WHAT THE ACT WAS. IT WAS A SPEECH IN THE  
11 LEGISLATURE. THAT'S UNQUESTIONABLY A LEGISLATIVE ACT. THAT  
12 ENDS THE INQUIRY. WELL, LET'S -- LET'S -- YOU KNOW, WE'RE NOT  
13 TALKING ABOUT A VOTE HERE. WE'RE NOT TALKING ABOUT A COMMITTEE  
14 HEARING. WE'RE TALKING ABOUT A PHONE CALL FROM A SENATOR IN  
15 SOUTH CAROLINA TO A GEORGIA STATE-LEVEL OFFICIAL. THAT'S IT.  
16 HOW IS THAT A LEGISLATIVE ACT?

17 THE ONLY WAY WE GET THERE IS THAT THE SENATOR COMES  
18 FORWARD AND STARTS TALKING ABOUT HIS MOTIVATIONS ABOUT THE ACT  
19 AND STARTS SAYING THAT THIS COURT SHOULD DISREGARD THE PUBLIC  
20 STATEMENTS OF THE OTHER PARTICIPANTS ON THE PHONE CALL ABOUT  
21 WHAT ACTUALLY TOOK PLACE AND INSTEAD TAKE ONLY HIS STATEMENTS  
22 AND WHAT HE MEANT BY THEM. THE ONLY WAY THEY'D GET WHERE THEY  
23 NEED TO GO IS TO BRING IN MOTIVATION BECAUSE, OTHERWISE, IT'S A  
24 PHONE CALL FROM A FOREIGN SENATOR TO A STATE-LEVEL OFFICIAL  
25 ABOUT A MATTER THAT IS NOT AT ALL WITHIN THE SENATOR'S AMBIT,



1 WITHIN THE SENATOR'S POWER, IN AN ONGOING RECOUNT, WHICH IS  
2 WHAT WAS HAPPENING WHEN THE CALL WAS MADE. THAT'S AT THE MOST  
3 BASIC LEVEL WHAT THE ACT WAS. IF YOU DON'T EVEN BRING IN ANY  
4 STATEMENTS ABOUT MOTIVATION, THEN IT LOOKS AS IF THIS IS A CALL  
5 THAT IS A CONTACT TO THE -- A COMMUNICATION BETWEEN A  
6 LEGISLATOR AND AN EXECUTIVE BRANCH OFFICIAL. GRANTED, THE  
7 CASES USUALLY CONTEMPLATE A COMMUNICATION BETWEEN A MEMBER OF  
8 CONGRESS AND A FEDERAL EXECUTIVE OFFICIAL. THAT IS A STATE  
9 LEVEL OFFICIAL. SO WE'RE NOW EVEN FURTHER REMOVED FROM -- AND  
10 IT'S A CONVERSATION WHERE THE LEGISLATOR IS HAVING -- IS  
11 TALKING TO AN EXECUTIVE BRANCH OFFICIAL ABOUT MATTERS THAT THE  
12 EXECUTIVE BRANCH OFFICIAL CONTROLS. THERE'S NOTHING  
13 LEGISLATIVE ABOUT THAT. YOU HAVE TO TAKE THE SENATOR --

14 THE COURT: WHAT ABOUT THE ARGUMENT, THOUGH, THAT  
15 BECAUSE SENATOR GRAHAM EVENTUALLY HAD TO VOTE TO CERTIFY THE  
16 ELECTION, HE HAD TO, ON HIS OWN, GATHER INFORMATION ABOUT  
17 IRREGULARITIES AND TRY TO FIND OUT IF HE IN FACT SHOULD DO THAT  
18 VOTE, AND THAT'S ALL HE WAS DOING, IS JUST ASKING QUESTIONS?

19 MR. WAKEFORD: THAT WOULD -- IF HIS DUTIES UNDER THE  
20 ELECTORAL COUNT ACT WERE ENOUGH, THEN TOTAL QUASHAL WOULD HAVE  
21 TO BE APPROPRIATE. THE PROBLEM IS HIS OWN STATEMENTS MAKE  
22 CLEAR THAT'S NOT WHAT HE WAS DOING WHERE HE WAS ASKING THEM TO  
23 CHANGE THEIR PROCESSES TO ONE THAT HE PREFERRED. ADDITIONALLY,  
24 THE SENATOR'S ACTIONS UNDER THE ELECTORAL COUNT ACT, HE GAVE  
25 HIS REASONS FOR WHY HE VOTED TO CERTIFY THE ELECTION -- THE

1 ELECTORS FROM GEORGIA. IT DIDN'T HAVE ANYTHING TO DO WITH HIS  
2 CONVERSATION WITH THE SECRETARY.

3 THE COURT: WELL, THAT, TO ME, IS GETTING INTO THE  
4 PRETTY CLEAR STATEMENTS IN THE CASES WHERE WE DON'T REALLY GET  
5 INTO AT ALL WHY VOTES WERE MADE, AND THAT IS SOMETHING THAT WE  
6 CAN'T REALLY INQUIRE INTO AS TO WHY THE DECISION WAS MADE.  
7 THAT'S THE CLEAR ISSUE HERE, IS THAT WE CAN'T ASK ABOUT WHY HE  
8 CERTIFIED THE ELECTION OR WHAT HIS MOTIVATIONS WERE FOR THE  
9 ACTUAL LEGISLATIVE ACT THAT HE TOOK.

10 MR. WAKEFORD: BUT TO THE -- I UNDERSTAND, YOUR  
11 HONOR. YOU'RE RIGHT. HE COULDN'T BE QUESTIONED BY THE GRAND  
12 JURY ABOUT HIS ACTIONS ON THE FLOOR OF THE SENATE, BUT TO THE  
13 EXTENT THAT HE'S OFFERING THEM HERE AS PART OF AN ARGUMENT FOR  
14 WHY HE DID THINGS, IT'S SORT OF, WELL, I DID IT BECAUSE THIS  
15 WAS MY REASON, BUT ALSO THE D.A. CAN'T QUESTION -- CAN'T  
16 QUESTION MY STATEMENTS ABOUT WHY I DID THAT. BUT LEAVING THAT  
17 ASIDE, HE STILL HAS A PROBLEM WITH THE STATEMENTS THAT HE  
18 HIMSELF MADE ABOUT THE FOCUS OF THE CONVERSATION WAS THE  
19 UPCOMING JANUARY 6 SENATE RUN-OFFS AND HOW I WANTED THEM TO  
20 MAKE THEIR PROCESSES BETTER FOR THAT. IF THAT WAS THE FOCUS OF  
21 HIS CONVERSATION, THE CONVERSATION BY HIS OWN WORDS HAS NOTHING  
22 TO DO WITH ANY RESPONSIBILITY UNDER THE ELECTORAL COUNT ACT  
23 BECAUSE THE SENATORIAL RUN-OFF ELECTION HAS NOTHING TO DO WITH  
24 THE ELECTORAL COUNT ACT. AND BY HIS OWN WORDS, AGAIN, WE HAVE  
25 AN INDICATION THAT TOTAL QUASHAL IS NOT APPROPRIATE HERE

1 BECAUSE THIS CONVERSATION WAS NOT ABOUT LEGISLATIVE PURPOSES,  
2 AT LEAST NOT SOLELY, BECAUSE HE HIMSELF IS SAYING AS MUCH.

3 SO, ADDITIONALLY, THE MANNER AND METHOD OF COUNTING  
4 ABSENTEE VOTES AND WHAT HE'S SUGGESTING, I DON'T SEE HOW HIS  
5 ACTIONS UNDER THE ELECTORAL COUNT ACT ARE IMPLICATED BY  
6 SUGGESTING THAT CHANGES BE MADE TO THAT. SO -- I'M SORRY. IS  
7 THERE -- WITH REGARD TO THE ELECTORAL COUNT ACT, HE CAN COME  
8 FORWARD AND SAY, WELL, EVENTUALLY I HAD TO CERTIFY, BUT THAT  
9 SHOULD NOT REMOVE EVERY CONVERSATION THAT THE SENATOR HAD ABOUT  
10 THE ELECTION EVER FROM THE POSSIBILITY OF QUESTIONING BEFORE A  
11 LAWFULLY IMPANELED GRAND JURY.

12 THE COURT: IF YOU WERE TO HAVE QUESTIONED HIM IN A  
13 GRAND JURY ABOUT THIS, WHAT ARE YOUR THOUGHTS ON HOW TO STEP  
14 THROUGH THESE QUESTIONS THAT ARE KIND OF -- IT'S YOUR OPINION  
15 THAT THEY HAVE TO PUT FORTH THE RECORD TO -- AND THE FACTS TO  
16 SUPPORT ALL OF THIS. I COULD SEE A SCENARIO WHERE A QUESTION  
17 TO SENATOR GRAHAM, FOR EXAMPLE OF, "WHAT DID YOU TALK ABOUT ON  
18 THAT CALL?" THAT MIGHT BE A BROAD QUESTION THAT WOULD IMPLICATE  
19 POTENTIALLY SPEECH AND DEBATE CLAUSE ISSUES. BUT MORE NARROW  
20 QUESTIONS, LIKE, DID YOU TELL RAFFENSPERGER TO DO ANYTHING  
21 OR -- THAT'S KIND OF A DIFFERENT WAY OF GETTING AT INFORMATION  
22 THAT IS NOT SUBJECT TO THE SPEECH OR DEBATE CLAUSE. HAVE YOU  
23 THOUGHT ABOUT HOW THIS IS ACTUALLY GOING TO WORK IF THERE ISN'T  
24 A COMPLETE QUASHAL, BUT INSTEAD KIND OF THIS AMBIGUOUS  
25 SOME-THINGS-ARE-IN-AND-SOME-THINGS-ARE-OUT PIECE OF IT AND HOW

1 YOU'RE GOING TO TIGHTEN QUESTIONS TO MAKE SURE THAT THEY DON'T  
2 IMPLICATE SOME OF THESE BIGGER ISSUES?

3 MR. WAKEFORD: YES, WE HAVE. BUT BEFORE I MOVE --  
4 ANSWER YOUR QUESTION, I FORGOT ONE VERY IMPORTANT THING ABOUT  
5 YOUR PRIOR QUESTION REGARDING THE ELECTORAL COUNT ACT. ALSO,  
6 ANY -- THERE ARE STATEMENTS BY PARTICIPANTS ON THAT CALL THAT  
7 SENATOR GRAHAM ASKED ABOUT THE ELIMINATION OF ABSENTEE VOTES  
8 BY -- BECAUSE OF ERROR RATE AND THROWING OUT ENTIRE  
9 GEOGRAPHICAL POPULATIONS WORTH OF VOTES IN AREAS WITH CERTAIN  
10 ERROR RATES, AND ALSO HOW THAT MAY AFFECT POSSIBLE LITIGATION  
11 ON BEHALF OF THE TRUMP CAMPAIGN. NONE OF THOSE THINGS HAVE TO  
12 DO WITH HIS DUTIES UNDER THE ELECTORAL COUNT ACT.

13 THE COURT: NOW, A PROBLEM I HAVE WITH KIND OF BOTH  
14 SIDES HERE IS THAT THERE'S A LOT THAT'S NOT IN THE RECORD.  
15 THERE ARE A LOT OF STATEMENTS WHERE I'M HEARING THAT SENATOR  
16 GRAHAM DIDN'T SAY THINGS AND HE DIDN'T BELIEVE THINGS, AND I'M  
17 HEARING THAT OTHER PEOPLE SAID OR BELIEVE DIFFERENT THINGS, AND  
18 I'VE GOT WHAT THE SUBPOENA MAY BE ABOUT OR HOW BROAD IT IS OR  
19 NOT, BUT THERE'S NO EVIDENCE OR REALLY ANYTHING THAT IS IN THE  
20 ACTUAL RECORD OF THE BRIEFS THAT DEFINES THINGS LIKE THAT THAT  
21 THERE IS INFORMATION THAT HE WAS TELLING PEOPLE TO THROW OUT  
22 BALLOTS. I MEAN, THAT'S A VERY IMPORTANT FACT, BUT IT'S NOT  
23 ANYWHERE. AND IT'S ON BOTH SIDES. HOW AM I SUPPOSED TO RULE  
24 IN YOUR FAVOR WITHOUT ANY OF THIS IN THE RECORD?

25 MR. WAKEFORD: WELL, SOME OF IT IS IN THE RECORD. TO

1 GO BACK TO THE CERTIFICATE, THAT'S WHERE THESE ALLEGATIONS ARE  
2 FIRST RAISED, IS THAT THESE -- THAT THE SENATOR MADE CERTAIN  
3 STATEMENTS THAT WERE ON BEHALF OF OR AT LEAST POLITICALLY  
4 MOTIVATED RATHER THAN LEGISLATIVE AND MOTIVATED AND RELATED TO  
5 THE SPECIAL PURPOSE GRAND JURY'S INQUIRY. THERE'S ALSO THE  
6 STATEMENTS THAT WE REFERENCED IN THE PUBLIC SPHERE BY SECRETARY  
7 RAFFENSPERGER AND MR. STERLING WHICH ARE NOT PART OF THE  
8 SPECIAL PURPOSE GRAND JURY'S INVESTIGATIVE PROCESS, BUT ARE  
9 ALREADY IN THE PUBLIC SPHERE. BUT YOUR QUESTION GETS TO THE  
10 AWKWARDNESS OF THIS POSITION, WHICH I TALKED A LITTLE BIT ABOUT  
11 WHEN WE WERE HERE FOR CONGRESSMAN HICE AND WE CONFRONT YET  
12 AGAIN. AND IT ACTUALLY GOES TO THE QUESTION YOU JUST ASKED ME  
13 ABOUT, HAVE WE THOUGHT ABOUT HOW WE'RE GOING TO HANDLE THIS  
14 PROCESS. WE ARE CONDUCTING A SECRET GRAND JURY INVESTIGATION  
15 WHERE CONFIDENTIALITY IS IMPORTANT. AND SO PLACING IN THE  
16 PUBLIC SPHERE TO THE COURT ALL OF THE ANTICIPATED QUESTIONS WE  
17 THINK WE'RE GOING TO GO INTO IS NOT SOMETHING THAT IS  
18 NECESSARILY IN THE INTEREST OF THE SPECIAL PURPOSE GRAND JURY  
19 WHICH WE ARE -- WHICH WE MUST PROTECT. HOWEVER, WE ALSO  
20 UNDERSTAND THE COURT'S POSITION THAT YOU HAVE TO MAKE A RULING.  
21 THE WAY THIS USED TO WORK IS THAT THERE HAD TO BE A FINDING OF  
22 CONTEMPT AT THE STATE COURT LEVEL BEFORE REMOVAL WAS PROPER.  
23 AND IN THAT SCENARIO QUESTIONS HAVE ALREADY BEEN ASKED,  
24 ARGUMENTS HAVE ALREADY BEEN RAISED AND THERE'S ALREADY A MUCH  
25 FULLER RECORD WHEN IT GETS TO THE COURT THAT WE DON'T -- THAT

1 YOU WOULDN'T NECESSARILY RUN INTO THESE PROBLEMS. NOW THAT THE  
2 MERE ISSUANCE OF A SUBPOENA ALLOWS FOR REMOVAL, WE'RE HERE IN  
3 THIS AWKWARD PLACE WHERE IT'S QUESTIONS ABOUT WHAT QUESTIONS  
4 MAY BE ASKED. AND CERTAINLY THE PROCESS THAT WE WOULD BE  
5 WILLING TO UNDERGO WITH THE SENATOR IS WHEN THIS CASE IS  
6 REMANDED, WHICH WE HOPE IT IS, BACK TO SUPERIOR COURT, WE  
7 ENGAGE IN A CONVERSATION ABOUT WHAT AREAS WE CAN EXPECT THERE  
8 TO BE NO ARGUMENT ABOUT, WHAT AREAS THERE COULD BE ARGUMENT  
9 ABOUT, AND WHAT AREAS ARE UNQUESTIONABLY, YOU KNOW, THAT WE  
10 CAN'T GO INTO BECAUSE OF THE LEGISLATIVE PRIVILEGE. THAT WILL  
11 GUIDE THE QUESTIONING IN THE SPECIAL PURPOSE GRAND JURY. AND I  
12 UNDERSTAND WHAT --

13 THE COURT: WELL, WHY DIDN'T THAT ALREADY HAPPEN?  
14 BECAUSE IT LOOKS LIKE JUST WHAT HAPPENED IS A SUBPOENA WENT OUT  
15 AND THERE WASN'T ANY ATTEMPT TO DO THIS AT THE OUTSET, SO THERE  
16 MIGHT HAVE BEEN SOME KIND OF COMPROMISE OR UNDERSTANDING  
17 REACHED, OR THAT THEY WOULDN'T HAVE TO JUST RESORT TO THE  
18 MOTION TO QUASH, THERE COULD HAVE BEEN A LITTLE BIT MORE OF A  
19 CONCRETE PROCESS.

20 MR. WAKEFORD: I HAVE AN ANSWER TO THAT QUESTION, BUT  
21 I WANT TO CLARIFY SOMETHING WITH MY COLLEAGUE REAL QUICK.

22 THE COURT: OKAY.

23 MR. WAKEFORD: THANK YOU.

24 I APPRECIATE THE INDULGENCE, YOUR HONOR.

25 THE COURT: SURE.

1 MR. WAKEFORD: THE SIMPLEST ANSWER IS BECAUSE IN  
2 ORDER TO BRING IN AN OUT-OF-STATE WITNESS, WE HAVE TO GO  
3 THROUGH THIS PROCESS THAT IS SET BY THE UNIFORM ACT TO SECURE  
4 WITNESSES FROM OUT OF STATE. WE HAVE TO FILE THE PETITION AND  
5 GET THE CERTIFICATE. THAT IS CHARACTERIZED BY THE MOVANT, BY  
6 THE SENATOR AS AN EX PARTE ACT, BUT THAT'S HOW THE STATUTE  
7 WORKS. THAT'S THE STATUTE WE HAVE TO COMPLY WITH IN ORDER TO  
8 ENSURE THAT THE SENATOR CAN APPEAR. AS SOON AS THAT WAS DONE,  
9 IN FACT BEFORE THE CERTIFICATE -- THE INITIAL CERTIFICATE WHICH  
10 WAS ISSUED HAD EVEN BEEN PRESENTED IN A FOREIGN COURT, THERE  
11 WAS A MOTION TO QUASH AND A REMOVAL ACTION FILED IN SOUTH  
12 CAROLINA. THERE WAS THEN ONE FILED IN THE DISTRICT OF  
13 COLUMBIA. SO THE MERE -- THE VERY FIRST STAGE OF THE PROCESS,  
14 WHICH WAS US TRYING TO BEGIN THE LABOR-INTENSIVE PROCESS OF  
15 SECURING AN OUT-OF-STATE WITNESS, WAS MET WITH IMMEDIATE  
16 MOTIONS FOR REMOVAL AND QUASHAL. SO THAT PROCESS COULDN'T  
17 BEGIN BECAUSE WE WERE ALREADY IN AN ANTAGONIST POSTURE BECAUSE  
18 THE SENATOR MOVED TO QUASH INSTANTLY AS SOON AS WE INITIATED  
19 THIS. SO WE ARE STILL WILLING TO GO THROUGH THAT PROCESS. IN  
20 FACT I THINK IT WILL BE NECESSARY AS WE FOUND WHEN WE WERE HERE  
21 ABOUT CONGRESSMAN HICE. THERE IS I BELIEVE A SMALLER UNIVERSE  
22 OF FACTS THAT IS BEING ARGUED NOW THAN IN CONGRESSMAN HICE'S  
23 CASE, BUT IT'S THE SAME PROCESS. IT'S GOING TO BE ESSENTIAL  
24 AND IT'S ONE THAT WE ARE WILLING TO MOVE FORWARD AND DO. BUT  
25 WHAT WE'VE BEEN ASKED TO DO, WHAT WE'VE HAD TO DO HERE IS COME

1 BEFORE THIS COURT AFTER ATTEMPTS WERE MADE IN TWO OTHER COURTS  
2 AND SAY, PLEASE DO NOT QUASH THE SYSTEM IN ITS ENTIRETY. AND  
3 SO THAT IS THE ARGUMENT THAT WE ARE PRESENTING TO YOU NOW.

4 THE COURT: OKAY. WHY DON'T YOU MOVE TO THE  
5 SOVEREIGN IMMUNITY ISSUE.

6 MR. WAKEFORD: WELL, LET ME ADDRESS ONE THING. THERE  
7 IS THE REPEATED ASSERTION THAT OUR INVESTIGATION IS CIVIL AND  
8 NOT CRIMINAL. THAT IS BASED ON A SINGLE LINE OF DICTA FROM A  
9 GEORGIA COURT OF APPEALS CASE CALLED KENERLY THAT SAYS SPECIAL  
10 PURPOSE GRAND JURY CAN ONLY CONDUCT CIVIL INVESTIGATIONS. THE  
11 PROBLEM IN ADDITION TO BEING DICTA THAT HAS NEVER BEEN  
12 AFFIRMED -- NEVER BEEN CONSIDERED, AFFIRMED OR ENDORSED BY THE  
13 GEORGIA SUPREME COURT, IS THAT IT'S FLATLY WRONG. KENERLY IS  
14 INTERPRETING A DIFFERENT COURT OF APPEALS CASE THAT HAD A  
15 DIFFERENT HOLDING AND MISCHARACTERIZING IT. AND I THINK  
16 REVIEWING KENERLY -- THIS WAS FIRST RAISED IN THEIR REPLY BRIEF  
17 WHICH IS WHY WE HAVEN'T BRIEFED THIS ISSUE. BUT KENERLY WAS  
18 PURPORTING TO INTERPRET A CASE CALLED BARTEL. BARTEL DOES NOT  
19 SAY THAT SPECIAL PURPOSE GRAND JURIES ARE ONLY CIVIL. BARTEL  
20 SAYS IN THAT CASE IT WAS CLEARLY A CIVIL INVESTIGATION AND IT  
21 ACTUALLY COULD HAVE BEEN A CIVIL GRAND JURY IMPANELED UNDER  
22 EITHER THE REGULAR GRAND JURY STATUTE OR THE SPECIAL PURPOSE  
23 GRAND JURY STATUTE. IT DOESN'T MATTER. THAT'S WHAT THE BARTEL  
24 CASE SAID. AND SOMEHOW THE KENERLY CASE GOT FROM THAT, WELL,  
25 SPECIAL PURPOSE GRAND JURY CAN ONLY CONDUCT CIVIL



1 INVESTIGATIONS. THAT -- THERE IS ABSOLUTELY NO BASIS FOR THAT  
2 STATEMENT. BUT EVEN LEAVING THAT ASIDE, THE DICTA IN KENERLY,  
3 THERE IS THE STATUTE THAT THIS SPECIAL PURPOSE GRAND JURY'S  
4 IMPANELED UNDER WHICH IS 15-12-100 WHICH STATES THAT IT CAN BE  
5 CONVENED TO INVESTIGATE ANY VIOLATION OF THE LAWS OF THIS  
6 STATE. THERE IS 15-12-102 WHICH SAYS, SPECIAL PURPOSE GRAND  
7 JURIES, TO THE EXTENT THAT WE DON'T SAY EXPLICITLY THEY ARE  
8 DIFFERENT, ARE JUST LIKE REGULAR GRAND JURIES, WHICH ARE  
9 OBVIOUSLY -- CAN BE IMPANELED TO CONDUCT CRIMINAL  
10 INVESTIGATIONS.

11       THERE IS THE LETTER REQUESTING THE SPECIAL PURPOSE GRAND  
12 JURY FROM THE DISTRICT ATTORNEY, A CRIMINAL INVESTIGATIVE  
13 OFFICER, SAYING WE WANT TO INVESTIGATE FACTS AND CIRCUMSTANCES  
14 RELATED TO POSSIBLE CRIMINAL DISRUPTIONS TO THE ADMINISTRATION  
15 OF GEORGIA ELECTIONS. AND THERE'S THE IMPANELING ORDER WHICH  
16 MAKES EXPLICIT REFERENCE TO THAT LANGUAGE AND SAYS THAT THE  
17 SPECIAL PURPOSE GRAND JURY WILL BE EMPOWERED TO INVESTIGATE ANY  
18 VIOLATIONS OF THE LAWS OF THE STATE OF GEORGIA. SO IF WE LEAVE  
19 ASIDE ALL OF THAT, WELL, YOU WOULD HAVE TO LEAVE ASIDE EVERY  
20 SINGLE ONE OF THOSE FACTS FOR IT TO HOLD THAT THIS GRAND JURY  
21 IS SOMEHOW CIVIL. THE MERE FACT THAT THE GRAND JURY CANNOT  
22 RETURN AN INDICTMENT DOES NOT RENDER IT CIVIL. THIS IS A  
23 CRIMINAL INVESTIGATION AND HAS BEEN FROM THE START. SO THAT  
24 ELIMINATES ONE PART OF THEIR ARGUMENT THAT SOVEREIGN IMMUNITY  
25 APPLIES HERE BECAUSE THIS IS A CRIMINAL CASE.

1           ADDITIONALLY, ALL OF THE CASES WHICH THEY CITE THAT  
2 INVOLVE THE INVOCATION OF SOVEREIGN IMMUNITY IN CRIMINAL CASES  
3 ARE STRANGE CASES THAT INVOLVE THE TOUHY DOCTRINE WHERE A  
4 FEDERAL EXECUTIVE BRANCH OFFICIAL HAS NOT BEEN GIVEN CLEARANCE  
5 BY HIS OR HER ORGANIZATION TO APPEAR UNDER THEIR REGULATIONS TO  
6 APPEAR UNDER SUBPOENA. AND THOSE CASES SIMPLY SAY THAT YOU  
7 CAN'T -- YOU CAN'T FORCE A FEDERAL OFFICIAL TO TESTIFY WITHOUT  
8 COMPLYING WITH TOUHY REGULATIONS, WHICH HAS ABSOLUTELY NO  
9 APPLICATION TO THE CURRENT SITUATION. THERE IS NO INDICATION  
10 THAT THE UNITED STATES SENATE HAS DIRECTED SENATOR GRAHAM NOT  
11 TO APPEAR AND NOT TO COMPLY WITH THIS SUBPOENA AND HE'S NOT A  
12 PARTY TO ANY KIND OF CIVIL LITIGATION. HE IS NOT BEING SUED.  
13 AND SOVEREIGN IMMUNITY IS JUST FLATLY NOT APPLICABLE TO THIS  
14 CASE.

15           THE COURT: OKAY. AND THE LAST ARGUMENT WOULD BE THE  
16 HIGH-RANKING EXECUTIVE DOCTRINE.

17           MR. WAKEFORD: HIGH-RANKING OFFICIAL DOCTRINE.

18           THE COURT: YES, OFFICIAL DOCTRINE. THAT'S RIGHT.

19           MR. WAKEFORD: EXECUTIVE IS A GOOD POINT BECAUSE WE  
20 STILL MAINTAIN THAT IT'S REALLY DESIGNED TO APPLY TO EXECUTIVE  
21 BRANCH OFFICIALS. THE YOHO (PHONETIC) CASE FROM THE SOUTHERN  
22 DISTRICT OF FLORIDA, I BELIEVE, AND IT IS AN ELEVENTH CIRCUIT  
23 DISTRICT COURT CASE, LAYS THIS OUT PRETTY PERSUASIVELY THAT  
24 THIS -- THE CONCERNS THAT ANIMATE THE HIGH-RANKING OFFICIAL  
25 DOCTRINE ALL HAVE TO DO WITH PEOPLE BEING THE PERSON AT THE TOP

1 OF THE PYRAMID IN A VERY COMPLICATED FEDERAL, BUREAUCRATIC  
2 ATMOSPHERE. HOWEVER, EVEN ASSUMING THAT IT CAN APPLY TO  
3 MEMBERS OF CONGRESS, WE HAVE MADE A DEMONSTRATION OF -- AND WE  
4 GOT INTO THIS LAST TIME WHEN I WAS HERE -- YOU KNOW, THE  
5 QUESTION OF APPLICABILITY TO MEMBERS OF CONGRESS IS ONE THING.  
6 WE STILL MAINTAIN IT'S NOT APPROPRIATE AND THAT SPEECH AND  
7 DEBATE CLAUSE AMPLY COVERS THIS SITUATION IN ADDITION TO  
8 CONGRESS'S OWN RULES ABOUT AUTHORIZING TESTIMONY, WHICH WE'VE  
9 HEARD NOTHING ABOUT FROM THE SENATOR. BUT LEAVING ALL THAT  
10 ASIDE, THERE ARE EXTRAORDINARY CIRCUMSTANCES IN THIS CASE.  
11 THE -- THIS IS ONE AREA WHERE THE CERTIFICATE IS PARTICULARLY  
12 HELPFUL BECAUSE IT LAYS OUT THE MATERIALITY AND NECESSITY OF  
13 THE SENATOR TO PROVIDE HIS -- THE BASIS FOR HIS -- WHAT HE DID  
14 EXACTLY, WHAT HE DID AND THE REASONS FOR THEM. AND IN A  
15 SITUATION WHERE WE HAVE A DISPUTE AS TO EXACTLY WHAT HE DID,  
16 HE'S THE ONLY PERSON WHO CAN TELL US THAT BECAUSE WE'VE GOTTEN  
17 DISPUTED OTHER VERSIONS OF WHAT HAPPENED ON THAT CALL.

18 I FIND IT PARTICULARLY STRANGE THAT IT IS AN ARGUMENT  
19 UNDER THE HIGH-RANKING OFFICIAL DOCTRINE FROM THE SENATOR THAT  
20 OTHER PEOPLE HAVE ALREADY GIVEN INFORMATION, SO WE SHOULDN'T  
21 HAVE TO ASK THEM. WELL, THEY'VE GIVEN INFORMATION THAT HE  
22 DISPUTES VEHEMENTLY. AND HE SHOULD ANSWER. HE SHOULD COME AND  
23 ANSWER QUESTIONS ABOUT WHY THEIR RECOLLECTION IS INCORRECT.  
24 BUT SOMEHOW THAT CUTS AGAINST HIS -- THE APPLICABILITY -- OR IT  
25 CUTS FOR THE APPLICABILITY OF A DOCTRINE THAT WOULD REMOVE THE

1 POSSIBILITY OF SUBPOENAING HIM? I DON'T FOLLOW. SO IT IS  
2 ESSENTIAL THAT THE SENATOR BE THE ONE TO PROVIDE THE  
3 INFORMATION ABOUT WHAT HE DID ON THE CALL. WE HAVE NO  
4 INDICATION THAT ANYBODY FROM HIS OFFICE WAS ON THE CALL OR  
5 COULD PROVIDE INFORMATION ABOUT IT. EVEN IF WE COULD, THERE  
6 ARE -- ASKING THE SECRETARY OF STATE TO TAKE PARTICULAR ACTIONS  
7 IS NOT A LEGISLATIVE ACT. WE WANT TO KNOW WHY HE DID THAT.  
8 WE -- ASKING THE SECRETARY OF STATE TO CHANGE THINGS FOR A  
9 RUN-OFF ELECTION IS NOT A LEGISLATIVE ACT. WE WANT TO KNOW WHY  
10 HE DID THAT.

11 THE COURT: WHY DO YOU NEED SENATOR GRAHAM? BECAUSE  
12 IT SOUNDS LIKE YOU ALREADY HAVE A LOT OF INFORMATION ABOUT  
13 THESE SUBJECTS. AND WE DO HAVE AN INVESTIGATIVE GRAND JURY  
14 THAT'S JUST GATHERING INFORMATION. IT APPEARS, AT LEAST WHAT  
15 I'M HEARING TODAY, WHAT SENATOR GRAHAM WOULD SAY WOULD MAYBE  
16 EVEN CUT AGAINST THAT BECAUSE YOU'VE GOT PEOPLE THAT ARE  
17 ALREADY SAYING ALL THIS BAD STUFF HAPPENED. BUT WHY DO YOU  
18 NEED HIM? BECAUSE ONE OF THE FACTORS IS BASICALLY THAT -- THE  
19 EXACT WORDS ARE -- I'VE LOST MY SPEECH AND DEBATE CLAUSE.  
20 THERE IT IS. HIGH-RANKING OFFICIAL DOCTRINE NOTES. THAT HE IS  
21 NECESSARY. AND SO WE'RE DOING AN INVESTIGATION ON WHICH ALL  
22 THESE OTHER PEOPLE HAVE ALREADY TALKED ABOUT, WHY DO YOU NEED  
23 HIM?

24 MR. WAKEFORD: BECAUSE THERE'S, ONE, A DISPUTE AS TO  
25 WHAT ACTUALLY HAPPENED ON THE PHONE CALL ORIGINATED BY THE

1 SENATOR HIMSELF. THERE IS A VERSION THAT HAS BEEN OFFERED BY  
2 OTHER PARTICIPANTS ON THE CALL WHICH HE DISPUTES PUBLICLY. AND  
3 SO IN ORDER TO NAIL DOWN WHAT HAPPENED, WHICH IS WHAT THE  
4 SPECIAL PURPOSE GRAND JURY HAS BEEN ASKED TO DO, WE NEED TO  
5 TALK TO THE SENATOR AND WORK OUT WHETHER THERE ARE  
6 DISCREPANCIES WITHIN THE ACCOUNTS OF THE --

7 THE COURT: AND IS THAT A POSSIBILITY THAT THE  
8 SENATOR HIMSELF IS SUBJECT TO POTENTIAL CRIMINAL ACTION?  
9 BECAUSE THE ONLY REASON THAT IT'S IMPORTANT FOR HIM TO SAY THAT  
10 IN FACT HE WAS NOT INTIMIDATING ANYONE, IS FOR THAT PIECE.  
11 OTHERWISE, ALL YOU SAY THAT HE POTENTIALLY KNOWS ABOUT IS HIS  
12 EFFORTS IN TRYING TO INFLUENCE THE ELECTION.

13 MR. WAKEFORD: WELL, BUT TO THE EXTENT THAT THOSE  
14 EFFORTS ARE CONNECTED TO OTHER ACTIVITIES THAT HAVE COME BEFORE  
15 THE SPECIAL PURPOSE GRAND JURY, THERE IS THE QUESTION OF  
16 COORDINATION -- THE CERTIFICATE ACTUALLY LAYS OUT THAT WE ARE  
17 ASKING ABOUT WHAT WERE YOUR ACTIVITIES BEFORE THE CALL, WHAT  
18 WERE YOUR ACTIVITIES AFTER THE CALL, WHAT CONNECTIONS ARE THERE  
19 BETWEEN YOUR ACTIONS AND THE ACTIONS OF OTHERS THAT REVOLVED  
20 AROUND THE ADMINISTRATION OF THE ELECTIONS IN GEORGIA IN 2020?  
21 THERE WERE OTHER PHONE CALLS TO OTHER PUBLIC OFFICIALS IN  
22 GEORGIA. THAT'S A MATTER OF PUBLIC RECORD. THERE WERE  
23 OTHER -- THE FEDERAL OFFICIALS WHO CAME TO GEORGIA. THERE WAS  
24 A -- THERE WERE A NUMBER OF PIECES OF INVOLVEMENT BY PEOPLE  
25 WITHIN THE FEDERAL GOVERNMENT IN GEORGIA. AND SENATOR GRAHAM,

1 AS SOMEONE WHO'S CONNECTED PROFESSIONALLY AND POLITICALLY TO  
2 THOSE INDIVIDUALS, CAN PROVIDE INFORMATION ABOUT THE EXTENT TO  
3 WHICH HIS CALL WAS COORDINATED WITH THOSE OTHER ACTIVITIES.  
4 IT'S NOT NECESSARILY EVEN TO SHOW THAT THE CALL ITSELF WAS A  
5 CRIMINAL ACT WHICH WOULD SUBJECT THE SENATOR TO AN INDICTMENT.  
6 IT'S TO SHOW THE EXTENT TO WHICH THERE IS A COORDINATION AMONG  
7 THE PARTIES TO SEEK TO EFFECT THE ADMINISTRATION OF ELECTIONS  
8 IN GEORGIA.

9 THE COURT: OKAY. NOW, IN TERMS OF YOUR PREFERRED  
10 COURSE OF ACTION, I'VE HEARD FROM MR. LEA AS TO HIS, HE WOULD  
11 WANT THE COURT, IF THE COURT DID NOT QUASH -- OBVIOUSLY HE  
12 WANTS THE COURT TO QUASH THE SUBPOENA.

13 MR. WAKEFORD: RIGHT.

14 THE COURT: SECOND CHOICE, IF I DON'T DO THAT, HE  
15 WANTS ME TO PROVIDE KIND OF BROAD-BRUSH GUIDELINES AS TO WHAT  
16 IS AND ISN'T ACCEPTABLE TO BE ASKED DURING ANY GRAND JURY  
17 TESTIMONY. IS THAT WHAT YOU WANT OR DO YOU WANT TO BRIEF THAT  
18 OR DO YOU WANT TO JUST REMAND IT BACK TO SUPERIOR COURT AND  
19 KIND OF GO FROM THERE? WHAT IS IT THAT YOU ARE REQUESTING?

20 MR. WAKEFORD: WHEN WE HAD THIS QUESTION COME UP  
21 BEFORE AND TOTAL QUASHAL WAS THE REQUEST, THE COURT INDICATED  
22 THAT -- I UNDERSTAND THAT NOW THERE IS A REQUEST FROM THE  
23 SENATOR THAT THERE BE -- IF TOTAL QUASHAL IS NOT GIVEN IN THIS  
24 INSTANCE, THAT THERE BE GUIDELINES GIVEN. IT WAS NOT MY  
25 UNDERSTANDING THAT THAT WAS A POSSIBILITY JURISDICTIONALLY

1 BECAUSE THE REMEDY THAT HAS BEEN REQUESTED IS TOTAL QUASHAL.  
2 IF TOTAL QUASHAL IS NOT GIVEN, THEN THE COURT HAS DECIDED AND  
3 THE CASE IS REMANDED. SO I WOULD SAY THAT THE DISTRICT  
4 ATTORNEY'S POSITION IS THAT WE PROCEED -- IF TOTAL QUASHAL IS  
5 NOT PROVIDED BY THIS COURT, THE CASE IS REMANDED AND THAT THE  
6 PARTIES NEGOTIATE THE SCOPE OF QUESTIONING OF SENATOR GRAHAM.  
7 IF THERE ARE ISSUES THAT COME UP AND HAVE TO BE LITIGATED  
8 FURTHER AT THAT POINT, THEN THEY COME BACK BEFORE THE COURT  
9 WITH A MUCH FULLER RECORD AND THE COURT CAN MORE ABLY DETERMINE  
10 WHETHER CERTAIN ISSUES FALL INSIDE OR OUTSIDE OF THE PRIVILEGE.  
11 AT THAT POINT HAVING GOTTEN CLOSER TO THE ACTUAL ASKING OF  
12 QUESTIONS OR PERHAPS EVEN HAVING ASKED QUESTIONS WHICH -- TO  
13 WHICH THE PRIVILEGE IS INVOKED. I JUST DON'T THINK THAT  
14 FURTHER BRIEFING AT THIS STAGE IS GOING TO PROVIDE THE  
15 ASSURANCE THAT WE NEED THAT THE FACTUAL ISSUES ARE FULLY  
16 FLESHED OUT. SO I THINK -- IT'S BEEN CHARACTERIZED BY OPPOSING  
17 COUNSEL AS WHACK-A-MOLE. I WOULD SAY MORE THAT IT'S GOING BACK  
18 AND GOING THROUGH THIS PROCESS, AND IF THERE ARE FURTHER ISSUES  
19 WITH THE INVOCATION OF THE PRIVILEGE, ASSUMING THEY CAN NO  
20 LONGER SAY THAT EVERY SINGLE STATEMENT THAT THE SENATOR EVER  
21 MADE HAD TO DO WITH HIS LEGISLATIVE ACTIVITIES, THAT THERE WILL  
22 BE MORE DEFINED FACTUAL CIRCUMSTANCES FOR THIS COURT TO  
23 CONSIDER FOR ANY FURTHER DISPUTES.

24 THE COURT: OKAY. THANK YOU.

25 MR. WAKEFORD: YOU'RE WELCOME. ARE THERE ANY OTHER

1 QUESTIONS TO WHICH I CAN HELP THE COURT?

2 THE COURT: YOU KNOW I'VE ASKED THEM, SO, NO, I WOULD  
3 HAVE ASKED THEM. SO THANK YOU.

4 MR. WAKEFORD: THANK YOU, YOUR HONOR. I DO STAND  
5 READY, HOWEVER, IF THE COURT REQUESTS FURTHER BRIEFING, FURTHER  
6 FACTS, FURTHER ANYTHING, TO PROVIDE IT. I'M NOT MAKING  
7 EXCUSES. THE FACT THAT WE HAD A TIGHT WINDOW TO BRIEF, THIS IS  
8 AN EXPEDITED MOTION, WE TOTALLY UNDERSTAND. BUT TO THE EXTENT  
9 THAT THERE ARE FACTUAL DEFICIENCIES WHICH THE COURT WOULD LIKE  
10 TO FLESH OUT, THAT IS ENTIRELY MY RESPONSIBILITY. AND I STAND  
11 READY TO GIVE THE COURT ANYTHING IT ASKS FOR.

12 THE COURT: OKAY. THANK YOU.

13 MR. WAKEFORD: THANK YOU VERY MUCH.

14 THE COURT: OKAY. MR. LEA.

15 MR. LEA: THANK YOU. SO TO SORT OF START FROM THE  
16 BACK AND WORK UP, FIRST, IS JUST THE PROCEDURAL QUESTION ABOUT  
17 PARTIAL QUASHAL. RULE 45(D) MAKES CLEAR THAT YOU CAN MODIFY OR  
18 QUASH A SUBPOENA TO THE EXTENT IT REACHES PRIVILEGE OR, IN THIS  
19 CASE, IMMUNE INFORMATION. WE'VE CITED ONE OF THEM IN OUR  
20 BRIEFS. IT'S THE M.L. HEALTHCARE CASE, BUT THERE ARE MANY  
21 OTHERS. COURTS PARTIALLY QUASH SUBPOENAS ALL THE TIME. THE  
22 IDEA THAT YOU COULDN'T PARTIALLY QUASH BECAUSE YOU'RE WITH US  
23 PART OF THE WAY BUT NOT ALL OF THE WAY IS INCORRECT. AND THEN,  
24 SECOND -- AND WE'D BE HAPPY TO PROVIDE THOSE IF HELPFUL TO THE  
25 COURT. SECOND, THIS IDEA THAT THAT SHOULD HAPPEN IN STATE



1 COURT, WE'VE HEARD NO REASON WHY. SECTION 1442 SAYS WE GET A  
2 FEDERAL FORUM FOR THIS. THEY SAY THEY WANT TO FIRM IT UP.  
3 THERE'S NO REASON TO FIRM IT UP IN STATE COURT AS A (VERBATIM)  
4 FEDERAL COURT UNLESS THEY'RE GOING TO TRY TO MAKE HIM GO IN AND  
5 ANSWER QUESTIONS IN REALTIME WITHOUT AN ATTORNEY PRESENT, WHICH  
6 VIOLATES THE IMMUNITY IN AND OF ITSELF. SO THAT'S JUST THE  
7 PROCEDURAL POINTS THAT WERE RAISED.

8 LOOKING TO THE HIGH-RANKING OFFICIAL DOCTRINE, THEY SAY  
9 THAT THERE'S A REAL DISPUTE ABOUT THE PHONE CALLS. THERE'S  
10 NOT, AT LEAST NOT ONE THAT THEY'VE COME FORWARD WITH. ALL THAT  
11 THEY HAVE SHOWN US IS A DISPUTE IN TERMS OF SECRETARY  
12 RAFFENSPERGER SAYING WHEN WHAT HE TOOK THE IMPLICATION OF THE  
13 CALL TO BE, WHAT WAS, IN HIS WORDS, IMPLIED. THERE'S NO REASON  
14 TO ASK SENATOR GRAHAM ABOUT AN IMPLICATION THAT SECRETARY  
15 RAFFENSPERGER'S --

16 THE COURT: ISN'T THERE SENATOR GRAHAM HAS MADE  
17 STATEMENTS ABOUT THE CALL PUBLICLY THAT SEEM TO HAVE DIFFERENT  
18 INTERPRETATIONS?

19 MR. LEA: I DON'T THINK HE HAS. I THINK HE'S BEEN  
20 CONSISTENT THAT HE WAS COVERING VOTING AND DIFFERENT FORMS OF  
21 CHECKING ABSENTEE BALLOTS AND WHAT THAT MEANT AND HOW HE AS A  
22 LEGISLATOR COULD IMPROVE THE PROCESS. THE COURT HAS LED ME  
23 INTO THE SPEECH AND DEBATE DOCTRINE WITH THAT QUESTION, THOUGH.  
24 I WOULD JUST SAY A FEW THINGS. ONE, HE'S A SENATOR. WE KNOW  
25 THAT ELECTION INTEGRITY IS WELL WITHIN HIS DOMAIN. HE'S

1 CHAIRMAN OF THE JUDICIARY COMMITTEE AT THE TIME. WE KNOW NOT  
2 ONLY DOES HE HAVE AN ONGOING INTEREST IN IT, HE'S CHAIRED  
3 HEARINGS ON ELECTION INTEGRITY AND VOTING RIGHTS BEFORE. BUT  
4 WE KNOW THAT IT WAS WITHIN THEIR JURISDICTION BECAUSE OTHER  
5 PEOPLE ON THAT COMMITTEE HAVE AS WELL. SECOND, WE HAVE THE  
6 CONSTITUTION, WHICH, AS I MENTIONED EARLIER, GIVES THE RIGHT  
7 FOR CONGRESS TO STEP IN AND CHANGE STATE VOTING REGULATIONS.  
8 WE ALSO HAVE THE ELECTORAL COUNT ACT WHICH MADE IT INCUMBENT ON  
9 HIM TO ULTIMATELY DECIDE WHETHER TO OBJECT OR TO CERTIFY JOE  
10 BIDEN AS PRESIDENT. HE ULTIMATELY VOTED TO CERTIFY. I HEARD  
11 MY FRIEND SAY, WELL, HE ENDED UP DEFERRING TO FEDERAL JUDGES.

12 I WOULD REFER THE COURT TO THE EASTLAND CASE FROM THE U.S.  
13 SUPREME COURT WHERE THEY SAID THAT THE NATURE OF INVESTIGATION  
14 IS SOMETIMES IT LEADS YOU UP ONE ALLEY AND YOU DECIDE THAT'S  
15 NOT THE WAY TO GO AND YOU BASE IT ON SOMETHING ELSE. NOT ONLY  
16 THAT, HE HAS PROPOSED AND CO-SPONSORED LEGISLATION TO CHANGE  
17 THE ELECTORAL COUNT ACT BASED ON HIS EXPERIENCE HERE, SO ALL OF  
18 THIS WITHIN HIS LEGISLATIVE DOMAIN. BASICALLY A SENATOR GETS  
19 TO DO HIS JOB. HE GETS TO ASK WHAT HE NEEDS TO ASK TO DO HIS  
20 JOB -- OH, AND, IN ADDITION, SENATE ELECTIONS. I'VE HEARD THEM  
21 NOW PIVOT HEAVILY TO THIS IDEA THAT IT WAS ABOUT SENATE  
22 ELECTIONS. NOT ONLY WAS THAT LOOKING FORWARD TO LEGISLATION,  
23 BUT IT WAS ALSO SOMETHING THAT IS ENTRUSTED. SENATORS GET TO  
24 DECIDE ON SEATING THEIR OWN MEMBERS JUST LIKE BOTH HOUSES DO.  
25 I DON'T HAVE THE CITE HANDY BECAUSE THAT WAS A NEW ARGUMENT

1 HERE. BUT THAT WAS SOMETHING ELSE THAT FALLS WITHIN HIS  
2 DOMAIN. AND SO THE BOTTOM LINE IS THE SENATOR HAS TO DECIDE  
3 HOW TO DO HIS JOB. YOU CAN'T SECOND-GUESS THE WORDING OF  
4 QUESTIONS OR WHO HE CHOSE TO ASK QUESTIONS TO BECAUSE THAT  
5 WOULD RENDER THE SPEECH OR DEBATE CLAUSE TOOTHLESS. YOU WOULD  
6 HAVE TO VIOLATE IT TO USE IT ESSENTIALLY. YOU WOULD HAVE TO GO  
7 IN AND ASK QUESTIONS. THEY WOULD HAVE FREE REIGN AND THEN YOU  
8 WOULD RENDER THE PHRASE, "SHALL NOT BE QUESTIONED," ESSENTIALLY  
9 OF NO MEANING. MY FRIEND DID MENTION BRIEFLY THIS IDEA OF  
10 SOVEREIGN IMMUNITY SAYING IT WASN'T A CIVIL GRAND JURY. YOU  
11 KNOW, IT'S NOT DICTA IN KENERLY. IT'S ESSENTIAL TO THEIR  
12 HOLDING. ONE -- I GET THE CASES BACKWARDS SOMETIMES.

13 THE COURT: I DON'T EVEN THINK THERE WAS SUCH THING  
14 AS A CIVIL GRAND JURY --

15 MR. LEA: GEORGIA HAS --

16 THE COURT: -- AND THE COURT OF APPEALS DECISIONS ARE  
17 NOT BINDING IN ANY WAY ON THIS COURT.

18 MR. LEA: TECHNICALLY UNDER EERIE COURT OF APPEALS  
19 DECISIONS ARE UNLESS THE COURT HAS A DEFINITE AND FIRM  
20 CONVICTION THAT THE SUPREME COURT WOULD DISAGREE. AND SO  
21 COURTS REGULARLY LOOK TO STATE COURT OF APPEALS DECISIONS IN  
22 DECIDING WHAT STATE LAW MEANS. THAT'S THE BEST SOURCE. AND  
23 THEY'VE DONE IT TWICE. AND SO IF IT'S NOT CRIMINAL, AS THE  
24 CASE HAS MADE CLEAR, AND MY FRIEND'S SAYING IT'S NOT CIVIL,  
25 WELL, WHAT IS IT? THE SAFEST COURSE IS TO DEFER TO GEORGIA AND

1 HOW THEY'VE DEFINED THEIR OWN PROCEEDINGS. MY FRIEND  
2 REFERENCED -- IT WAS TOUGH TO KEEP TRACK OF IT ALL,  
3 BUT REFERENCES TO THIS JUDGE TREATING IT AS CRIMINAL. YOU  
4 CAN'T DO ALCHEMY. IF THE LAW MAKES IT CIVIL, A JUDGE SAYING  
5 IT'S CRIMINAL DOESN'T MAKE IT CRIMINAL IN CONNECTION WITH THIS  
6 GRAND JURY. AND THEN MY FRIEND REFERENCES THE IDEA THAT THE  
7 SOVEREIGN IMMUNITY CASES ARE ALL ABOUT THIS TOUHY DOCTRINE AND  
8 FEDERAL REGULATIONS. THE LOUISIANA SPARKS CASE FROM THE FIFTH  
9 CIRCUIT IS VERY, VERY CLEAR THAT THAT GETS THE ANALYSIS  
10 BACKWARDS. EVERY CASE YOU'LL FIND ON SOVEREIGN IMMUNITY THAT  
11 DISCUSSES IT IN ANY DEPTH WILL SAY SOVEREIGN IMMUNITY EXISTS  
12 UNLESS WAIVED. THERE IS NO WAIVER. MY FRIEND HASN'T POINTED  
13 TO ANY WAIVER FROM THE SENATE, MUCH LESS THE SENATOR. AND,  
14 THEREFORE, SOVEREIGN IMMUNITY APPLIES HERE. SO AT THE END OF  
15 THE DAY WE WOULD URGE THE COURT TO FOLLOW THESE DOCTRINES AND  
16 THESE IMMUNITIES WHICH ALLOW A SITTING SENATOR TO DO HIS JOB  
17 FREE OF INTERFERENCE FROM A STATE PROSECUTOR. THAT'S WHAT THEY  
18 WERE DESIGNED TO DO, AND WHICH WE WOULD URGE THAT COURSE ON THE  
19 COURT AND WE WOULD URGE THE COURT TO GRANT THE MOTION.

20 THE COURT: OKAY. THANK YOU.

21 MR. LEA: THANK YOU.

22 THE COURT: YES, SIR.

23 MR. WAKEFORD: MAY I ADDRESS TWO POINTS VERY QUICKLY?

24 THE COURT: YES, BUT JUST MAKE SURE YOU COME TO THE  
25 MICROPHONE BECAUSE ACOUSTICS ARE BAD, SO I WANT TO MAKE SURE I

1 HEAR YOU.

2 MR. WAKEFORD: AND INCREDIBLY BRIEF, YOUR HONOR.  
3 I'VE ALREADY MADE THE ARGUMENT REGARDING KENERLY. EVEN A BRIEF  
4 READ OF KENERLY WE'LL SEE THAT IT MISSTATES THE WITHHOLDING OF  
5 ANOTHER CASE IN COMING TO THIS CONCLUSION, AND THAT ONE  
6 STATEMENT CANNOT UNDO THE LANGUAGE OF THE STATUTES AND THE  
7 STATUTES WHICH ACTUALLY CREATE SPECIAL PURPOSE GRAND JURIES AND  
8 SAY THAT THEY CAN BE CRIMINAL. I DO WANT TO CLARIFY FOR YOUR  
9 HONOR THAT CIVIL GRAND JURIES DO EXIST UNDER GEORGIA LAW, AND  
10 THAT WAS PART OF THE CONFUSION IN THE CASE THAT THE KENERLY  
11 CASE WAS REFERRING TO BECAUSE THE GEORGIA GRAND JURY STATUTE  
12 CAN ALLOW CIVIL GRAND JURIES TO SIT AND INVESTIGATE LOCAL  
13 COUNTY OFFICES, INSPECT THE JAIL, INSPECT THE DISTRICT  
14 ATTORNEY'S OFFICE, THINGS LIKE THAT WHERE THEY'RE NOT SEEKING  
15 TO FIND EVIDENCE OF CRIMINAL ACTIVITY, BUT SIMPLY DOING  
16 BASICALLY GOOD GOVERNANCE INVESTIGATIONS ON BEHALF OF THE  
17 PEOPLE OF WHATEVER COUNTY THAT IMPANELS THE GRAND JURY. SO I  
18 WOULD STILL SAY THAT A SIMPLE READ WILL INDICATE THAT KENERLY  
19 IS WRONGLY DECIDED.

20 SECONDLY, I JUST WANTED TO MENTION THAT THE SENATOR'S  
21 CO-SPONSORING CHANGES TO THE ELECTORAL COUNT ACT AND HOW THIS  
22 CONVERSATION IS PART OF THAT, THE PROPOSED LEGISLATION TO  
23 CHANGE THE ELECTORAL COUNT ACT HAS ABSOLUTELY NOTHING TO DO  
24 WITH THE SIGNATURE VERIFICATION PROCESS IN A STATE IN WHICH THE  
25 SENATOR DOES NOT LIVE OR ANY CONVERSATION THAT THE SENATOR HAD

1 ABOUT THAT. THE PROPOSED LEGISLATION WHICH HE HAS CO-SPONSORED  
2 IS ALL ABOUT WHAT HAPPENS ON THE DAY THAT THE SENATE CONVENES  
3 TO HAVE THE VICE PRESIDENT OPEN THE ELECTORAL VOTES FROM EACH  
4 STATE, HOW OBJECTIONS ARE HEARD, HOW THEY ARE COUNTED, AND WHAT  
5 GOES ON IN A -- AS A PARLIAMENTARY MATTER WITHIN THE SENATE.  
6 IT HAS ABSOLUTELY NOTHING TO DO WITH THE TOPICS BROACHED IN THE  
7 CONVERSATION SUGGESTED BY ANYONE WHO IS ACTUALLY ON THE CALL.  
8 SO THE CALL HAS SIMPLY NOTHING TO DO WITH THAT LEGISLATION  
9 WHICH THE SENATOR CO-SPONSORS, AND THAT'S ALL I HAVE. THANK  
10 YOU.

11 THE COURT: THANK YOU.

12 MR. LEA: IF I MIGHT VERY BRIEFLY HAVE ONE MORE WORD  
13 ABOUT THAT VERY QUICKLY.

14 THE COURT: YES, JUST THAT.

15 MR. LEA: YEAH, JUST THAT ONE POINT, YOUR HONOR. THE  
16 SHORT ANSWER IS THAT EASTLAND MAKES VERY CLEAR THAT YOU DON'T  
17 LOOK TO THE END RESULT OF AN INVESTIGATION. YOU HAVE TO ALLOW  
18 FOR BLIND ALLEYS. AND IT'S SETTING UP A FALSE DICHOTOMY  
19 BETWEEN THIS IDEA THAT HE'S ASKING THESE POLITICAL THINGS, BUT  
20 IT'S ALSO RELEVANT TO HIS INVESTIGATION. THE ANALYSIS IS  
21 OBJECTIVE. YOU JUST LOOK AT WAS IT INVESTIGATING. YOU DON'T  
22 LOOK AT THE END RESULT AND YOU DON'T LOOK AT INTENT. AND,  
23 AGAIN, THAT'S EASTLAND.

24 THE COURT: OKAY.

25 MR. LEA: THANK YOU.

1 THE COURT: THANK YOU.

2 NOW, IN TERMS OF NEXT STEPS, THE SENATOR GRAHAM TEAM IS  
3 GOING TO GET ME A RESPONSE TO THE AMICUS BRIEF. ONE ISSUE I DO  
4 WANT YOU TO BRIEF AS PART OF THAT IS THIS ISSUE OF WHO HAS THE  
5 BURDEN TO PROVE THAT THIS IS LEGISLATIVE OR NOT LEGISLATIVE.  
6 SO THERE IS ONE POSITION FROM THE D.A.'S OFFICE, IS THAT IT'S  
7 THE SENATOR'S BURDEN TO PROVE BY A PREPONDERANCE OF THE  
8 EVIDENCE THAT IT'S LEGISLATIVE. IT APPEARS THAT SENATOR GRAHAM  
9 IS SAYING THAT IT IS THE D.A.'S OFFICE TO PROVE THAT IT IS NOT  
10 LEGISLATIVE. THAT POSITION IS NOT CLEAR IN THE BRIEFING, AND I  
11 THINK IT'S IMPORTANT. SO IN YOUR BRIEF THAT YOU SUBMIT ON THAT  
12 AND MAKE SURE THAT THAT ISSUE IS ADDRESSED. AND IF, THEN, THE  
13 D.A.'S OFFICE WANTS TO RESPOND TO THAT ARGUMENT, SO WE'RE ON A  
14 FAST TIMETABLE HERE. SO THAT BRIEF HAS TO BE WITH ME BY NOON  
15 TOMORROW FROM THE SENATOR'S OFFICE. IF YOU WANT TO RESPOND TO  
16 THAT, LET MY COURTROOM DEPUTY KNOW AND I WILL GIVE YOU UNTIL  
17 9:00 ON FRIDAY TO RESPOND TO THAT ARGUMENT ABOUT THE BURDEN OF  
18 PROOF ISSUE BECAUSE I THINK THAT'S ULTIMATELY SOMETHING THAT IS  
19 RELATIVELY IMPORTANT HERE. AND I WANT TO SEE ADDITIONAL  
20 BRIEFING ON THAT. OTHERWISE, I THINK I HAVE WHAT I NEED. IF  
21 THAT CHANGES AS MY ORDER IS BEING DRAFTED, I WILL LET YOU KNOW.  
22 I WOULD LOVE TO TELL YOU THAT I WILL GET THE ORDER OUT ON  
23 FRIDAY. I DON'T KNOW IF THAT'S TRUE. IT DEPENDS ON WHAT IS  
24 KICKED UP BY ALL OF THIS OTHER STUFF. I THINK THAT PROBABLY  
25 MONDAY IS MOST LIKELY WHEN YOU'LL GET IT, BUT I'M GOING TO TRY

1 TO GET IT ON FRIDAY. WE'LL JUST SEE WHETHER THIS CHANGES  
2 ANYTHING.

3 YES, SIR.

4 MR. WAKEFORD: DID YOU SAY 9 A.M. FRIDAY WOULD BE ANY  
5 RESPONSE FROM OUR OFFICE?

6 THE COURT: YES.

7 MR. WAKEFORD: OKAY. WELL, WE WOULD INTEND TO  
8 RESPOND.

9 THE COURT: OKAY. YEAH, JUST LET ME KNOW IF YOU'RE  
10 GOING TO RESPOND. BUT I THINK THE BURDEN OF PROOF ISSUE IS  
11 IMPORTANT AND I DON'T KNOW THAT IT'S BEEN FULLY ADDRESSED. AND  
12 IT MAY BE SOMETHING THAT ULTIMATELY HAS A GREAT DEAL OF IMPACT  
13 ON THE DECISION. I'M NOT SURE. EVEN THOUGH Y'ALL WON'T DO  
14 THIS, DON'T READ TOO MUCH INTO THE QUESTIONS BECAUSE I'M TRYING  
15 TO FIGURE THIS ALL OUT. AND SOMETIMES IT'S DEVIL'S ADVOCATE,  
16 SOMETIMES IT'S TESTING ABOUT WHAT I'M THINKING ABOUT WRITING.  
17 I WANTED TO HEAR FROM YOU AND KIND OF GO INTO THE WEEDS WITH  
18 ALL OF THAT. I KNOW IT'S MORE FUN JUST TO GIVE YOUR ARGUMENTS,  
19 BUT IT'S LESS HELPFUL AND ME REALLY UNDERSTANDING THEM. SO YOU  
20 BOTH WERE VERY PATIENT AS I ASKED ALL THESE QUESTIONS, AND I DO  
21 APPRECIATE THAT. IT'S NOT EASY TO DO THAT, AND I UNDERSTAND  
22 THAT. I TAKE ALL OF THIS VERY SERIOUSLY AND WANT TO GET A GOOD  
23 ORDER OUT, SO I'M GOING TO MAKE SURE THAT I DO THAT, AND THEN  
24 WE'LL JUST GO FROM THERE. IF I NEED ANYTHING ELSE FROM YOU, I  
25 WILL LET YOU KNOW. SO, WITH THAT, I APPRECIATE IT AND WE ARE



1 ADJOURNED.

2 (PROCEEDINGS ADJOURNED.)

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## C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, MONTRELL VANN, RPR, RMR, RDR, CRR, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF GEORGIA, DO HEREBY CERTIFY THAT THE FOREGOING 80 PAGES CONSTITUTE A TRUE TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE SAID COURT, HELD IN THE CITY OF ATLANTA, GEORGIA, IN THE MATTER THEREIN STATED.

IN TESTIMONY WHEREOF, I HEREUNTO SET MY HAND ON THIS, THE 11TH DAY OF AUGUST 2022.

/S/ MONTRELL VANN  
MONTRELL VANN, RPR, RMR, RDR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT